In the

Supreme Court of the United States

October Term, 1975

No. 75-5706

Charles William Proffitt,

Petitioner,

—v.—

State of Florida,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

Jack Greenberg
James M. Nabrit, III
David E. Kendall
Peggy C. Davis
10 Columbus Circle, Suite 2030
New York, New York 10019

Anthony G. Amsterdam
Stanford University Law School
Stanford, California 94305

Attorneys for the N.A.A.C.P. Legal Defense and Educational Fund, Inc.

INDEX

TABLE OF AUTHORITIES

Cases: PAGE

Statutes:

Other Authorities: PAGE

PAGE

In the

Supreme Court of the United States

October Term, 1975

No. 75-5706

Charles William Proffitt,

Petitioner,

—v.—

State of Florida,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

Statement of Interest of the N.A.A.C.P. Legal Defense and Educational Fund, Inc.

(1) The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist black citizens in securing their constitutional rights by the prosecution of lawsuits.

(2) The experience of Legal Defense Fund attorneys in handling capital cases over a period of many years convinced us that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged. Further study and reflection led us to the conclusion that the evil of discrimination was

not merely adventitious, but was rooted in the very nature of capital punishment. Accordingly, in 1967, the Legal Defense Fund undertook to represent all condemned men in the United States, regardless of race, for whom adequate representation could not otherwise be found. Additionally, the Fund provided consultative assistance to attorneys representing a large number of other condemned defendants.

(3) Since this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the Legal Defense Fund has continued to provide legal assistance to indigent condemned prisoners of all races. Fund attorneys now represent on appeal more than one hundred death-sentenced defendants. Among these are a number of prisoners condemned under Florida's 1972 death penalty statute; and we have filed certiorari petitions in this Court on behalf of six such prisoners. *Sullivan* v. *Florida*, No. 74-6377; *Hallman* v. *Florida*, No. 74-6168; *Gardner* v. *Florida*, No. 74-6593; *Songer* v. *Florida*, No. 75-5800; *Alford* v. *Florida*, No. 74-6717; *Spenkelink* v. *Florida*, No. 75-5209.

(4) The Court's decision in the instant case may resolve the constitutional issues upon which the lives of these six men and our other Florida clients depend.

(5) Consent has been granted by petitioner and respondent for the filing of this brief *amicus curiae*.

Question Presented

Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions Involved

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail should not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes of Florida:

> *Fla. Stat. Ann. §775.082 (1975-1976 supp.) Penalties for felonies and misdemeanors*
>
> "(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
>
> (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).
>
> (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced

to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). . . .[1]

Fla. Stat. Ann. §782.04 (1975-1976 supp.)[2] ***Murder***

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the

[1] This statute was amended by Florida Laws 1974, c. 74-383, effective July 1, 1975, to provide:

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

"(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)."

[2] This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974, c. 74-383, §14 (effective July 1, 1975) enacts a new §782.04 which provides:

"*782.04 Murder*

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of a person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although with any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 755.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb. . . . shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775.

(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy; or the unlawful throwing, placing or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree punishable as provided in section 775.082, section 775.083, or section 775.084."

Fla. Stat. Ann. §782.07 (1975-1976 supp.) Manslaughter

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §921.141 (1975-1976 supp.)[3] *Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence*

"(1) *Separate proceedings on issue of penalty*— Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems unrelevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).[4] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the

[3] Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing on sentencing, a special jury may be summoned.

[4] The subsections setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1975-1976 supp.), however, are numbered respectively, (5) and (6).

defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) *Advisory sentence by the jury*—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) *Findings in support of sentence of death*—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the

court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) *Review of judgment and sentence*—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after the certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) *Aggravating circumstances*—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) *Mitigating circumstances.*—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

Fla. Stat. Ann. §922.09 (1973) Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of conviction and sentence, and the sheriff shall send the

record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."

Fla. Stat. Ann. §922.10 (1973) Execution of death sentence

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

Fla. Stat. Ann. §922.11 (1973) Regulation of execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officers and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by

relatives, the body shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

Statement of the Case

Petitioner has been condemned for first degree murder under a statute enacted by a Special Session of the Florida Legislature on December 8, 1972. Florida Laws 1972, c. 72-724. On July 31, 1973, an "Indictment for a First Degree Murder" was returned in the Hillsborough County Circuit Court charging that petitioner did "unlawfully, and from a premeditated design to effect the death of JOEL RONNIE MEDGEBOW . . . murder the said JOEL RONNIE MEDGEBOW by stabbing him to death with a knife." [5] (R. 204.)[6]

Petitioner worked for the Maas Bros. department store in Tampa (R. 302), and had loaded trucks there until about 7:30 p.m. on July 9, 1973. (R. 303.) He then went to Caesar's Palace, a nearby bar, with two co-workers and remained there until 3:00 a.m. on July 10, 1973. (R. 304.) He was wearing gray trousers and a white Maas Bros. shirt with the company emblem over his breast pocket. (R. 313, 323, 331.) When petitioner left the bar, he took one of the co-workers home, leaving him between 3:30 and 3:45 a.m. (R. 310-311.)

Mrs. Joel Ronnie Medgebow testified that she and her husband went to a dinner party on July 9, 1973, where they

[5] The State proceeded on the theory that petitioner was guilty of either felony—murder or premeditated—deliberated first degree murder (R. 99, 103, 216, 422, 437, 443); the trial court instructed on both theories (R. 473); and the jury returned a general verdict finding petitioner guilty of first degree murder. (R. 491.)

[6] The indictment appears in the record on an unnumbered page between page 20 and 21.

drank some alcohol and smoked some marijuana. (R. 267-268.) They returned to their apartment and went to bed about 10:00 p.m. (R. 249.) At a little before 5:00 a.m. (R. 250), Mrs. Medgebow was awakened by the moaning of her husband. (R. 251.) Suddenly, a man jumped up from her husband's side of the bed, hit her "maybe three times" and ran out of the apartment. *(Ibid.)* Mrs. Medgebow switched on the light and saw that her husband had been stabbed once and was apparently dead. *(Ibid.)* She removed the knife, which he had been grasping, from his chest. She then called the police and ran to get assistance from a neighbor. (R. 251-252.) As she left the apartment, she noticed that a sliding glass door to the pool area of the apartment complex was open. (R. 252.) Mrs. Medgebow was able to give a detailed description[7] of her husband's assailant, but she was unable to identify petitioner as the person who stabbed her husband and struck her. (R. 254.) According to a pathologist, Joel Ronnie Medgebow had been killed by a single stab wound in the heart, seven centimeters deep. (R. 228-229.) There were no other injuries to the body. (R. 229).

A sixteen-year old lodger (R. 386) in petitioner's trailer, Mrs. Helen Bassett, testified that from her bedroom she

[7] According to Mrs. Medgebow, the intruder was a white male of medium height (R. 255), with a "relatively good build" (R. 266), a substantial nose with a "very large" end (*ibid.*), light brown straight hair brushed back on both sides and on top (R. 255, 263-264) (some of his hair fell across his forehead and resembled bangs (R. 263)—the man was not balding (R. 264)), wearing a white pin-striped, long-sleeved shirt (R. 255) (with no company name on the pocket (R. 262)), with the shirt tail out and the sleeves rolled up and light gray or khaki trousers. (R. 255.) The Medgebow apartment did not appear to have been ransacked (R. 276, 290), and although objects of "quite substantial" value (R. 292), jewelry (R. 292-293), and money (R. 293) were in plain sight, and $142 in cash was in a pair of Medgebow's trousers by the bed (*ibid.*), nothing had been taken from the apartment by the intruder. (R. 290.)

heard petitioner return to the trailer at about "5:30 a.m." on July 10, 1973, and converse with his wife. (R. 375-376.) Although Mrs. Bassett was unable to hear part of this conversation (R. 382-383), she heard petitioner say "[h]e . . . had killed a man . . . [w]ith a butcher knife . . . [while] he was burglarizing the place" (R. 376). She also heard petitioner state that "a lady" was there at the time of the killing and that he had knocked her out. (R. 379.) Petitioner told his wife "to wait a couple of hours before, her to call the police [sic] and to pick up his check the next day." (R. 379-390.) Mrs. Bassett then heard the trailer door close and someone left the trailer and get into the Proffitt family car. (R.378.) According to Mrs. Bassett, she "went into the kitchen and Mrs. Proffitt came in and she was crying and she said 'Oh my God.' And I said 'Yes, I know. I heard.' And she says 'I have to call the police.' And I says, 'Well do what you think you have to do.' And then . . . she left. She went out." *(Ibid.)*

A Tampa detective talked to Mrs. Proffitt early on July 10 (R. 340); a first degree murder warrant was obtained for petitioner's arrest (R. 341); and the police broadcast a radio bulletin for his automobile at 5:34 a.m. (R. 333). The car was found abandoned on an interstate highway exit ramp at 6:35 a.m. on July 10 (R. 353-354) by a state patrolman.

At petitioner's trial[8] the State introduced a white Ma[illegible]s Bros. shirt found in Petitioner's trailer (R. 334), which had a slight surface smear and a stain the size of a pinhead that were identified as human blood (R. 360-363). This was not a sufficient amount to determine blood type. (R. 361). The police lifted five latent fingerprints from the

[8] During jury selection, a venireman was excluded for cause by the State on account of his conscientious scruples against the death penalty (R. 111-112, 114).

sliding doors in the Medgebow apartment (R. 234), but the "comparable" prints did not match petitioner's (R. 240, 243). Petitioner introduced no evidence at trial.[9]

The jury was instructed that it could find petitioner guilty of first degree murder with a " 'premeditated design' " (R. 473), or first degree felony-murder (R. 475), second degree murder (R. 476), third degree murder (R. 477), manslaughter *(ibid.)*, or not guilty. It returned a verdict of first degree murder. (R. 491.)

[9] The theory of petitioner's defense was that Joel Ronnie Medgebow had been killed for reasons relating to illegal marijuana trafficking. At a pre-trial deposition of Mrs. Medgebow, in response to defense counsel's question, "do you know if your husband was a dealer in marijuana?" (R. 607), Mrs. Medgebow said, "I heard him talk to some his friends the night before, and I knew that they were going to pick up marijuana, and from the way they were talking they were going to pick up quite a bit. What he used to do is he never was dealing so to speak to people he didn't know, but we had some friends, maybe two or three couples, that smoked marijuana also and he would get—would buy, say, now, a large amount of marijuana and then he would cut it up and he would sell it to them, and that way he would make back the money that he had paid for it, and he would get a couple of lids free then for himself. He wouldn't have to pay for his own. But it was never except to these few people, to my knowledge." (R. 609). Petitioner's counsel declared in his opening statement that "[y]ou are going to find out that there was a quantity of marijuana within the apartment. You are also going to find out, through testimony of witnesses, that Ronnie Medgebow sold marijuana" (R. 218-219). While cross-examining a police officer concerning "contraband" (R. 296) found in the Medgebow apartment, defense counsel contended that there was "a large amount of marijuana in the apartment and I think that gives a motive for a criminal act" (R. 297). The State Attorney admitted that "[t]he marijuana was found in Joel Medgebow's apartment. There is no denying that," but asserted that there was "absolutely no connection in this case between marijuana and the death of Joel Ronnie Medgebow" (*Ibid.*). At the close of the evidence, the trial court denied the State's mistrial motion based on the reference to marijuana in defense counsel's opening statement, but added that "there is no such testimony in the record to support the statement; the statement was improper, counsel is to be chastised for making such a statement" (R. 424).

A sentencing hearing was subsequently held at which the State introduced one prior Connecticut conviction of petitioner for "breaking and entering without permission." (R. 494.) The State also introduced the testimony of Dr. James Crumbley, a medical doctor who was not a psychiatrist (R. 495-501.) *See* pages 56-57 *infra*. A majority of the jury recommended that petitioner be sentenced to death. (R. 535.) The trial court discharged the jury and appointed two psychiatrists to examine petitioner. (R. 541.) *See* page 56 n.61 *infra*. After their reports were received, the trial court entered findings of fact and sentenced petitioner to be electrocuted.[10]

---

[10] The court's written sentencing order set forth the following four "aggravating circumstances":

> "(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.
>
> "(B) That the Defendant CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.
>
> "(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.
>
> "(D) That the Defendant knowing through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons."

(R. 206-207.) The court further found that the statutory "mitigating circumstances" (*see* pages 32-34 *infra*) were "primarily negated" because:

> "(A) The Defendant CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering Without permission.
>
> "(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the influences of extreme mental or emotional disturbance.
>
> "(C) That the victim, JOEL RONNIE MEDGEBOW, was *not* a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

On May 28, 1975, the Florida Supreme Court affirmed this death sentence. *Proffitt* v. *State*, 315 So.2d 461 (Fla. 1975).

Summary of Argument

I.

Florida's 1972 capital punishment statute provides a three-stage procedure for selecting some convicted capital offenders to be killed while others live. Under this procedure, "[c]ertain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or [the Florida Supreme] . . . Court from exercising reasoned judgment in reducing the sentence to life imprisonment." *Alvord* v. *State*, 322 So.2d 533, 540 (Fla. 1975). Experience to date in the administration of the statute confirms that this frank

---

> "(D) That the Defendant CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.
>
> "(E) That the Defendant, CHARLES WILLIAM PROFFITT, did *not* act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.
>
> "(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was *not* substantially impaired.
>
> "(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance.

(R. 207, emphasis in original). The court thereupon concluded "that aggravating circumstances do exist, and that these aggravating circumstances *far outweigh* any circumstances which would mitigate the sentence in this case." (*Ibid.*, emphasis added). "The Court finds that the Defendant CHARLES WILLIAM PROFFITT, has been and would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution." (R. 208.)

statement of Florida law means exactly what it says: that in the same case, upon identical facts, a life sentence or a death sentence may be chosen by three discretionary decision-makers. Thus, life sentences and death sentences may be and are imposed with "no meaningful basis for distinguishing" the people who get them. *Furman* v. *Georgia,* 408 U.S. 238, 313 (1972) (concurring opinion of Mr. Justice White). Detailed examination of the new statute and its use demonstrates that, far from assuring regularity, it merely diffuses responsibility for the life-death sentencing choice.

This explicit capital sentencing decision is itself only one of several mechanisms by which an arbitrary fraction of death-eligible offenders is selected to be actually put to death. Prosecutorial charging and plea-bargaining discretion, jury discretion to convict of one or another amorphously distinguished "capital" or noncapital crimes, and gubernatorial discretion to grant or withhold clemency are all equally uncontrolled and uncontrollable. In its parts and as a whole, the process is inveterately capricious. To inflict death through such a process is to inflict unconstitutional cruel and unusual punishment within the fundamental historical concerns of the Eighth Amendment[11] that were recognized in *Furman* v. *Georgia, supra.*

II.[12]

The perpetuation of arbitrariness in post-*Furman* capital punishment schemes is not mere happenstance. The death penalty is too cruelly intolerable for our society to apply

[11] These concerns are documented in the Brief for Petitioner in *Fowler* v. *North Carolina,* No. 73-7031, at pp. 26-45, and we do not repeat that documentation in the present brief.

[12] This point incorporates by reference the submissions made in petitioners' briefs in *Fowler* v. *North Carolina,* No. 73-7031, and *Jurek* v. *Texas,* No. 75-5394.

it regularly and even-handedly; and it is inherently too purposeless and irrational to be applied selectively on any reasoned, non-invidious basis. None of the justifications advanced to support the cruelty of killing a random smattering of prisoners annually survives examination in the light of the realities of this insensate lottery; and none begins, of course, to justify the killing of any particular human being while his indistinguishable counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few.

I.

Introduction.

In 1972, contemporaneously with its decision in *Furman* v. *Georgia,* 408 U.S. 238, this Court summarily vacated a number of Florida death sentences on the authority of *Furman.*[13] The Supreme Court of Florida,[14] the Court of Appeals for the Fifth Circuit,[15] and the District Court for the Middle District of Florida,[16] thereafter vacated additional death sentences which had been imposed pursuant to

[13] *Anderson* v. *Florida,* 408 U.S. 938; *Pitts* v. *Wainwright,* 408 U.S. 941; *Boykin* v. *Florida,* 408 U.S. 940; *Brown* v. *Florida,* 408 U.S. 938; *Hawkins* v. *Wainwright,* 408 U.S. 941; *Johnson* v. *Florida,* 408 U.S. 939; *Paramore* v. *Florida,* 408 U.S. 935; *Thomas* v. *Florida,* 408 U.S. 935; *Williams* v. *Wainwright,* 408 U.S. 941.

[14] *Anderson* v. *State,* 267 So.2d 8 (Fla. 1972); *Chaney* v. *State,* 267 So.2d 65 (Fla. 1972); *Reed* v. *State,* 267 So.2d 70 (Fla. 1972); *In re Baker,* 267 So.2d 331 (Fla. 1972). *See also Donaldson* v. *Sack,* 265 So.2d 499 (Fla. 1972).

[15] *Newman* v. *Wainwright,* 464 F.2d 615 (CA5 1972).

[16] *See Adderly* v. *Wainwright,* 58 F.R.D. 389 (M.D. Fla. 1972).

Florida's "Recommendation to Mercy" statute.[17] These decisions left no doubt that Florida's pre-1972 death penalty laws were invalid under the Eighth Amendment.

The Florida Legislature responded by enacting c. 72-724 at a Special Session in December, 1972. This legislation authorizes the death penalty for first degree murder, Fla. Stat. Ann. §782.04(1) (1975-1976 supp.), and for sexual battery of a child eleven years of age or under, Fla. Stat. Ann. §794.011(2) (1975-1976 supp.). It was approved by the Governor on December 8, 1972, and took effect immediately.

The relevant portions of the 1972 law are set forth fully at pages 3-12 *supra*. Summarily, it provides a bifurcated trial procedure for the administration of the death penalty. After a defendant is found guilty of a capital felony, a sentencing hearing is conducted before the jury which renders an advisory sentencing verdict. The trial court then pronounces sentence, determining whether there are "sufficient" aggravating circumstances to justify the imposition of a death sentence or "sufficient" mitigating circumstances to justify the imposition of a life sentence. Fla. Stat. Ann. §921.141(1) (1975-1976 supp.), pages 7-8

[17] Fla. Stat. Ann. §919.23 (1969 supp.) provided:

Recommendation to mercy.

"(1) In all criminal trials, the jury in addition to a verdict of guilty of any offense, may recommend the accused to the mercy of the court or to executive clemency, and such recommendation shall not qualify the verdict except in capital cases. In all cases the court shall award the sentence and shall fix the punishment or penalty prescribed by law.

"(2) Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life; or if found by the judge of the court, where there is no jury, to be entitled to a recommendation to mercy, shall be sentenced to imprisonment for life, at the discretion of the court."

supra. The statute sets forth some aggravating and mitigating circumstances for the jury and the trial court to consider. Fla. Stat. Ann. §921.141(5), (6) (1975-1976 supp.), pages 9-10 *supra*. If a death sentence is imposed, the case is automatically reviewed by the Florida Supreme Court.

These are the procedures under which petitioner Charles William Proffitt was sentenced to die. *Amicus* respectfully submits that his death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. Such a sentence, so imposed, flouts *Furman* (Part II, *infra*) and is inconsistent with "the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Chief Justice Warren) (Part III, *infra*).

II.

The Arbitrary Infliction of Death.

A. *At the Penalty Trial.*

1. Florida's 1972 Death Penalty Legislation Is Explicitly Discretionary.

We start with the observation that Florida's post-*Furman* capital sentencing procedure remains avowedly discretionary. In *State* v. *Dixon*, 283 So.2d 1, 8-9 (Fla. 1973), the Supreme Court of Florida declared:

> "[t]he mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, *supra;* it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, *supra*. . . .

"Thus, if the judicial discretion possible and necessary under Fla. Stat. §921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, *supra,* has been met. . . .

"Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included—with ranges of possible impact of each—and provided for the imposition of death under certain circumstances, and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges."

So, in *Alvord* v. *State,* 322 So.2d 533, 540 (Fla. 1975), the Court recognized that:

"[t]he law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur [sic]. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment."

Again, in *Swan* v. *State,* 322 So.2d 485 (Fla. 1975), the Florida Supreme Court construed Rule 3.710 of the Florida Rules of Criminal Procedure (1975), which provides that "[i]n all cases in which the court has discretion as to what sentence may be imposed," it may require a presentence report. The Court ruled that "[s]ection 921.141, Florida Statutes, vests the trial court with the limited discretion to impose either the death penalty or life imprisonment . . . Thus, the discretionary nature of Section 921.141 brings it within the ambit of Rule 3.710." 322 So.2d at 489.[18]

[18] It is possible albeit difficult to reconcile the specific holding in *Swan* with that in *Thompson* v. *State,* Fla. Sup. Ct., No. 45,107, decided January 21, 1976. Both cases construe Fla. R. Crim. Proc. 3.710 (1975), which provides:

"In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

We have seen in the text that *Swan* allows a trial judge, in his discretion, to order a presentence investigation report following a first degree murder conviction. This holding is explicitly based upon the ground that such a conviction is a case "in which the court has [sentencing] discretion" within the meaning of the first sentence of Rule 3.710. But in *Thompson,* where the death-sentenced appellant was 17 years old (slip opinion, at p. 1) and "had no prior criminal record" (slip opinion, at p. 5), the Florida Supreme Court held that the second sentence of Rule 3.710 did not require the judge to order a presentence investigation report. The only support offered for this conclusion was a quotation from the *Committee Notes* to Rule 3.710: " 'no [pre-sentence investigation]

2. The Statutory Enumeration of Aggravating and Mitigating Circumstances Does Not Control Arbitrariness in the Exercise of Capital Sentencing Discretion.

The iteration of eight "aggravating" and seven "mitigating" circumstances in Fla. Stat. Ann. §921.141 (1975-1976 supp.) pages 9-10 *supra*, does not significantly confine, channel, or regularize capital sentencing discretion. This is so for several reasons.

(a) *The breadth of the statutory aggravating circumstances.*

The enumeration of statutory aggravating circumstances does not meaningfully narrow the range of first degree murder cases in which death *may* be imposed as a penalty. For these enumerated circumstances are so broadly written as to make virtually any first degree murder convict a candidate for a death sentence. One of the statutory aggravating circumstances, for example, is that the crime

---

report is necessary where the specific sentence is mandatory, e.g., the sentence of death or life imprisonment in a verdict of first degree murder.'" (Slip opinion, at p. 5.)

Obviously, the commentator who wrote this passage either (1) thought that a first degree murder conviction was *not* a case "in which the court has [sentencing] discretion" within the first sentence of Rule 3.710, or (2) thought that the only purpose for a presentence investigation report was to enable the sentencing judge to consider the possibility of probation, or (3) thought that this was the only purpose for *requiring* a sentencing judge to order a presentence investigation report in the cases prescribed by the second sentence of the Rule, although a judge could order a report for other purposes under the first sentence of the Rule. Equally obviously, theories (1) and (2) had been rejected by the Florida Supreme Court in *Swan* before *Thompson* came up. So *Thompson* can only rest upon the third theory (unless *Thompson* is the product of an oversight). The trouble with the third theory is that, if this is what the commentator had in mind, he chose an extraordinarily opaque way to state it; and the Florida Supreme Court in *Thompson* neither hinted at this theory nor undertook to distinguish (or even to cite) *Swan*.

is "especially heinous, atrocious, or cruel." Fla. Stat. Ann. §921.141(5)(h), page 10 *supra*. The scope of this provision is illustrated by the Florida Supreme Court's effort to limit it:

> "we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

State v. *Dixon, supra,* 283 So.2d at 9.[19]

Other provisions have a similar wide scope. The provision that "[t]he defendant knowingly created a great risk of death to many persons," Fla. Stat. Ann. §921.141(5)(c), page 9 *supra,* was found applicable in petitioner's case although (1) the killer of Joel Medgebow encountered only two people during the perpetration of his crime, and (2) he killed Mr. Medgebow with a single blow of a *knife,* which he did not wield toward or against any other person. All first degree felony-murder cases are automatically "aggra-

---

[19] Although the Florida Supreme Court has, in cases subsequent to *Dixon*, found that particular killings were not "especially heinous, atrocious, or cruel" on their facts, it has not narrowed the scope of *Dixon's* formulation; and the later cases therefore serve only to qualify the expansiveness of subsection 921.141(5)(h) with an equal measure of vagueness. *See* pages 48-50 *infra*.

vated"[20] because Fla. Stat. Ann. §921.141(5)(d), page 9 *supra*, declares it to be an aggravating circumstance that first degree murder is committed in connection with each

[20] The scope of first degree felony-murder liability in Florida is itself both broad and vague. At the time of petitioner's crime, Fla. Stat. Ann. 782.0.(1)(a), page 4 *supra*, provided:

> "[t]he unlawful killing of a human being . . . when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb . . . shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082."

Second degree felony-murder was defined by Fla. Stat. Ann. §782.04(2), page 6 *supra*:

> "[w]hen committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it [the unlawful killing of a human being] shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court."

In *State* v. *Dixon*, 283 So.2d 1, 11 (Fla. 1973), the Florida Supreme Court ruled that these subsections established "two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree [citing Fla. Stat. Ann. §776.011 (1972)]. . . . The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. As to the distinction in any particular case, we need but refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact."

At petitioner's trial, however, the court's instructions did not reflect either the language of the relevant statutes or the *Dixon* exegesis:

> "The killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb . . . is murder in the first degree even though there is no premediated design or intent to kill."

(R. 475).

> "Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without a premediated design to effect the death of any particular individual and not [sic] done in the perpetration of or in an attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.
>
> • • •
>
> "If the killing was not from a premediated design to effect the death of any human being and was not [sic] committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind regardless of human life, the defendant should be found guilty of murder in the second degree."

(R. 476, 479).

In 1974, the Florida legislature enacted a new definition of second degree felony-murder, effective July 1, 1975:

> "[w]hen a person is killed in the perpetration of or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775."

Fla. Stat. Ann. §782.04(3) (1975-1976 supp.), page 5, n. 2 *supra*. Whether this enactment codifies or overrules *Dixon* is obscure.

of the same felonies (except one) which formed the predicate for first degree felony-murder under Fla. Stat. Ann. §782.04(1)(a), page 4 *supra*. The excepted felony is heroin distribution; and killings in the perpetration of heroin distribution would presumably be "aggravated"

under either the "great risk of death to many persons" provision, *supra*, or the "pecuniary gain" provision of Fla. Stat. Ann. §921.141(5)(f), page 10 *supra*. The expansiveness of the latter aggravating circumstances is obvious.[21] And the subsection which designates an "aggravating circumstance" the fact that the "capital felony" of sexual battery of a person under 11 occurred "in the commission of, or an attempt to commit, any . . . rape," §921.141(5)(d), page 9 *supra*, clearly aggravates any sexual assault made potentially capital by Fla. Stat. Ann. §794.011(2) (1975-1976 supp.).[22]

---

[21] Although the "pecuniary gain" provision might be construed to apply to "contract murder" killings, the Florida Supreme Court has given it a much broader interpretation. In *Hallman* v. *State*, 305 So.2d 180, 181 (Fla. 1974), for example, the Florida Supreme Court affirmed a death penalty where the trial court had found this aggravating circumstance; the homicide for which appellant Hallman had been condemned occurred, however, during the course of a tavern robbery. Thus, this provision is potentially applicable to *any* slaying in which something of value is taken from the victim or the crime scene. *Cf.* §921.141(5)(d), p. 9 *supra*.

[22] Florida's sex crimes statutes were revised in 1974. "Sexual battery" is defined in Fla. Stat. Ann. §794.011(1)(f) (1975-1976 supp.) as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery shall not include acts done for bona fide medical purposes." Florida Statutes Annotated §794.011(2) (1975-1976 supp.) provides that it is a "capital felony" for a person eighteen years of age or older to "commi[t] sexual battery upon, or injur[e] the sexual organs" of a "person" eleven years of age or younger. Section 921.141 (5)(d) (1975-1976 supp.) still refers to the crime of "rape" as a predicate felony, although there is no such crime in Florida since Fla. Stat. Ann. §941.01 (1967) was repealed in 1974 and replaced by the crime of "sexual battery" defined in §794.011(1)(f) (1975-1976 supp.), quoted *supra*. Depending on the circumstances, "sexual battery" may be either a capital felony, *supra*, a "life felony" (Fla. Stat. Ann. §794.011(3) (1975-1976 supp.)), a "felony of the first degree" (Fla. Stat. Ann. §794.011(4) (1975-1976 supp.)), or a "felony of the second degree" (Fla. Stat. Ann. §794.011(5) (1975-1976 supp.)).

(b) *The recognition of nonstatutory aggravating circumstances.*

But the amplitude of the statutory aggravating circumstances does not alone account for the broad and unpredictable capital liability established by section 921.141. In addition, trial judges are free to invent—or not invent—aggravating circumstances on the basis of which particular defendants may be condemned. The Florida Supreme Court has declared that "the most important safeguard provided by Fla. Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." *Alford* v. *State*, 307 So.2d 433, 444 (Fla. 1975); *see also State* v. *Dixon*, *supra*, 283 So.2d at 8. However, it has simultaneously rendered this "safeguard" altogether nugatory by holding that a death sentence may be imposed on the basis of aggravating circumstances not specified in section 921.141. In *Sawyer* v. *State*, 313 So.2d 680 (Fla. 1975), the trial court overruled a jury recommendation of a life sentence for first degree murder and condemned the defendant. The trial judge's opinion listed six " 'additional facts which the jury did not have during their deliberation on the advisory sentence,' " 313 So.2d at 681, to justify the imposition of the death sentence.[23] The Florida Supreme Court recast these

---

[23] The trial judge found, 313 So.2d at 681:

"1. The defendant is charged in the United States District Court for the Southern District of Florida with the crime of bank robbery.

"2. This Court takes judicial notice of its own calendar and notes that there are thirteen (13) additional robbery cases against the same defendant, and that except for four (4) all have been heard before a magistrate and the magistrate has found that the proof was evident and the presumption great that the defendant, ANTHONY E. SAWYER, committed the offenses with which he stands charged. In the remaining four (4) robbery cases the defendant, ANTHONY E. SAWYER, waived his right for a preliminary hearing.

findings in terms of "aggravating circumstances"—although not the "aggravating circumstances" iterated in section 921.141—and affirmed appellant Sawyer's death sentence:

"[w]e find that the aggravating circumstances including (1) the facts of the armed robbery incident;[24] (2) the prior record including the commission of multiple robberies; (3) the fact that the appellant was a hard drug user, requiring the expenditure of $200.00 per day; and (4) the specific finding of threats of reprisals against persons involved in the trial and prosecution of the appellant and the appellant's violent temper, taken together, are more than adequate to justify the imposition of the death penalty in this cause."

313 So. 2d at 682. The number and nature of factors in aggravation which the jury and the trial judge may consider is thus totally unlimited.

"3. During the course of the trial the defendant communicated to various bailiffs that he would take reprisals against persons conducting the trial in the event he would be found guilty.

"4. On October 15, 1973, the date the defendant was to appear before the jury for the rendition of an advisory sentence, he refused to leave his cell in the Dade County Jail, physically assaulted one of the Corrections and Rehabilitation officers and had to be forcibly brought before the Court in handcuffs and leg irons. Counsel for the defendant objected to his being viewed by the jury with handcuffs and leg irons and additional guards were ordered in the courtroom and the handcuffs and leg irons were removed prior to a view by the jury.

"5. The Court finds the defendant is possessed of a violent and ungovernable temper, that he has demonstrated violence in the past and that he has the ability to carry out threats of violence expressed during the courses of the trial.

"6. The defendant according to the testimony adduced during the trial was supporting a drug habit of $200.00 a day or $72,000.00 a year. The Court is of the opinion that there is insufficient assistance available to curb this drug habit and the defendant could not be rehabilitated to a point where he would no longer be a danger to the community.

"For the reasons hereinabove stated, this Court, having considered the advisory opinion of the jury as well as the additional circumstances not known to the jury, has made the determination that the defendant be sentenced to death by electrocution."

[24] Fla. Stat. Ann. §921.141(5)(d), p. 9 *supra*, provides that it is an aggravating circumstance if "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery. . . ." This provision is not predicated on any particular "facts" of the robbery incident, and the Florida Supreme Court did not specify which "facts" were relevant to its "finding." The trial court, of course, did not rely on this particular statutory aggravating circumstance in its sentencing order.

(c) *The vagueness of the statutory aggravating circumstances.*

The statutory aggravating circumstances are as vague and amorphous as they are broad. Obviously, phrases such as "especially heinous, atrocious and cruel" or "great risk of death to many persons" are susceptible to varying interpretation and application by different juries and trial judges. The Florida Supreme Court candidly recognized in *State* v. *Dixon*, 283 So.2d 1, 6 (Fla. 1973), that, "[t]o a layman, no capital crime might appear to be less than heinous." Its attempt to gloss the section in order to give it some intelligible meaning that might differentiate *among* capital crimes is set out on page 25 *supra*. Subsequent Florida Supreme Court opinions have not improved upon the gloss.[25] "[W]e believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it

[25] "[I]t is difficult to understand how the [*Dixon* court's] . . . definition of heinous as 'extremely wicked' differs from its definition of atrocious as 'outrageously wicked' and, in fact, these judiciously created criteria are just as prone to subjectivity as the words they are meant to define." Forster, *Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman* v. *Georgia*, 1974 Ariz. L. J. 257, 285 (footnote omitted).

authorized the death penalty for first degree murder." *Tedder* v. *State*, 322 So.2d 908, 910 (Fla. 1975) (footnote omitted). *See, e.g., Halliwell* v. *State*, 323 So.2d 557, 561 (Fla. 1975), discussed at pp. 49-50 *infra*:

> "the mutilation of the body many hours later [after the killing] was not *primarily* the kind of misconduct contemplated by the Legislature in providing for the consideration of [the "especially heinous, atrocious, or cruel"] aggravating circumstanc[e]. If mutilation had occurred prior to death *or instantly thereafter* it would have been *more relevant* in fixing the death penalty." (Emphasis added.)

(d) *The breadth and vagueness of the statutory mitigating circumstances.*

The mitigating circumstances enumerated in section 921.141(6), p. 10 *supra*, are equally viscous. Here, a defendant's life may turn upon the view that his particular judge and jury choose to take of the meaning and the application of the questions whether "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (a question that apparently means something other than either legal insanity[26] or the *separate* mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"), or whether "[t]he defendant acted under extreme duress or under the substantial domination of another person," or whether he "was an accomplice in the capital felony committed by another person and his participation was relatively minor." Obviously, these impressionistic judgments cannot be made

[26] *See* note 60 *infra*.

with any predictability or uniformity.[27] Concerning the provision that "[t]he age of the defendant at the time of the crime" may be a "mitigating circumstance," the Supreme Court of Florida has written:

> "the Legislature has chosen to provide for consideration of the age of the defendant—*whether youthful, middle aged, or aged*—in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable *per se*. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court." *State* v. *Dixon, supra*, 283 So.2d at 10 (emphasis added).

And concerning the mitigating circumstances that "[t]he defendant has no significant history of prior criminal activity," it should be noted that (1) the Florida Supreme Court apparently[28] approved a finding in petitioner's case that one 1967 breaking-and-entering conviction "primarily negated" this circumstance, *Proffitt* v. *State*, 315 So.2d 461, 466 (Fla. 1975) (R. 207); and (2) a defendant's "significant history of prior criminal activity" may (but need not) be used alternatively as a nonstatutory aggravating circumstance as in *Sawyer* v. *State*, 313 So.2d 680, 681 (Fla. 1975), where the Florida Supreme Court treated criminal

[27] *See* Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. CRIM. L., CRIM. & POL. SCI. 10 17-18 (1973).

[28] We say "apparently" because the indistinct weighing process that is used under Florida law to test the "sufficiency" of mitigating circumstances against the "sufficiency" of aggravating circumstances makes it impossible to determine the significance accorded to any one circumstance in a particular case. *See* pp. 37-38 *infra*.

charges (*not* convictions) pending against a defendant as "aggravating," *see* page 30 and n.23 *supra*.

In *State* v. *Dixon, supra,* 283 So.2d at 9, the Florida Supreme Court held that aggravating circumstances must be proven by the State beyond a reasonable doubt. The Court has not allocated or defined the burden of proof with regard to mitigating circumstances, however, and advisory sentencing juries and trial courts are left "free to exercise unguided discretion when finding mitigating circumstances." [29]

(e) *The absence of any controls in the process of weighing the "sufficiency" of aggravating and mitigating circumstances.*

The manner in which "aggravating" and "mitigating" circumstances will be weighed and combined in the sentencing process is left to the undirected discretion of jurors and trial judges. Section 921.141(2), page 8 *supra,* makes the ultimate issue whether there are "sufficient" aggravating circumstances to sentence a defendant to death and whether there are "sufficient" mitigating circumstances to sentence him to life imprisonment.

> "The majority in *Dixon* stated that 'the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances" . . . . [283 So.2d at 10] But if it is not a counting process, what is it? Without some legislative formulation of the combination of circumstances that justify executing or not executing a defendant, the decision to execute is a function of the sentencer's discretion and

[29] Note, *Florida's Legislative and Judicial Responses to Furman* v. *Georgia: An Analysis and Criticism,* 2 FLA. ST. L. REV. 108, 141 (1974).

> nothing more. There are three reasons why the mere requirement that the sufficiency of the aggravating and mitigating circumstances be weighed does not effectively limit the sentencer's discretion. First, nowhere in the statute is the meaning of the word 'sufficient' developed, yet it is obviously the core of the matter. Secondly, the statute fails to assign, or even indicate, the relative weights of the various enumerated circumstances. Finally, the statute does not ordain what combination of mitigating circumstances will outweigh what combination of aggravating circumstances." [30]

Since the process of appraising "aggravating" and "mitigating" circumstances is entirely undirected, the trial judge may treat a particular aggravating factor as "sufficient" to outweigh three or four designated mitigating factors while another judge chooses to weigh the identical circumstances obversely. The same circumstances—or rationally undifferentiable circumstances—may be taken as a "sufficient" basis for a death sentence in one courtroom, and as insufficient in another room or on another day. And one sentencer may find that "aggravating" circumstance *A* outweighs "mitigating" circumstance *B* in the light of other, nonstatutory circumstances that a different sentencer would disregard or overlook, or which would cause a different sentencer to alight on the side of life instead of death.

3. "Trifurcation" Increases Sentencing Arbitrariness.

We have just seen that the propounding of "aggravating" and "mitigating" circumstances fails entirely to control or constrain the arbitrary license of juries, trial judges, or the Florida Supreme Court to impose—or to decline to impose

[30] Note, *Florida's Legislative and Judicial Responses to Furman* v. *Georgia: An Analysis and Criticism,* 2 FLA. ST. L. REV. 108, 139-140 (1974) (footnotes omitted).

—the death penalty in any particular case. Indeed, Florida's 1972 statutory capital sentencing procedure is *more* arbitrary and capricious than its pre-*Furman* death sentencing system because (1) sentencing discretion is more broadly disseminated, with no single participant in the process possessing ultimate responsibility for the life-or-death decision and (2) additional uncertainties are injected into the sentencing process by the provision for an "advisory" jury verdict concerning sentence.[31]

> "In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.
>
> "Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman*."

[31] *Cf.* the following statement by the Attorney General of Florida at a 1973 legislative hearing before the Select Committee on the Death Penalty of the Florida House of Representatives: "General Shevin . . . 'What I'm concerned about is that you're still giving the jury the option of going back and deciding; and I think again with almost unbridled discretion, whether or not to impose the death penalty. . . . I think [this] is just a little bit chancy [sic] as to whether the court would sustain it or strike it. It's awfully sophisticated and I think just for that reason, I think when it comes before the Court on the attack, that all they're doing here is letting the jury go back and again decide all this on a discretionary basis. I'm just afraid the Court may not see the sophistication and go ahead and strike the statute." *Hearings*, Select Committee on the Death Penalty, Florida House of Representatives, at 20-21 (August 9, 1972).

State v. *Dixon, supra,* 283 So.2d at 26 (dissenting opinion of Mr. Justice Boyd). Manifestly, Florida's "trifurcated death penalty statute," *Tedder* v. *State,* 322 So.2d 908, 910 (Fla. 1975),[32] has merely compounded the uncertainties of capital sentencing.

(a) *The opacity of the jury's advisory verdict.*

Since the jury does not specify in its verdict the aggravating and mitigating circumstances which it has considered and found, it is impossible for a trial court to relate the verdict to the sentencing scheme contained in the governing statute.[33] The jury's sentencing recommendation is an enigmatic "yes" or "no" on the question whether a capital defendant should be killed, and the trial judge must speculate to divine the underlying basis of the verdict.

[32] "The sentence procedures set out in the act are usually described as 'bifurcated.' In reality, however, the statute creates three tiers in the sentencing process—the jury, the judge, and this Court." *Alvord* v. *State,* 322 So.2d 533, 542 n. 10 (Fla. 1975) (dissenting opinion of Mr. Justice England).

[33] "The provision for a jury recommendation in the Florida Capital Punishment Act introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding the advisory sentence's relevance. Apparently, the trial judge should give great weight to the advisory sentence, but this is not clear from the statute. If the legislature did not intend the advisory sentence to be important, then the jury's participation in the sentencing hearing would be senseless and expensive extravagance. The further provision that a penalty jury be empaneled, even if there was no jury at the guilt trial, does seem to indicate that the legislature intended the trial judge to pay deference to the jury's recommendation. Regardless of the weight that the legislature intended the trial judge to give to the jury advisory sentence, however, there is another reason why the advisory sentences are problematic: they do not report the jury's underlying reasons for the sentencing decision reached."

Note, *Florida's Legislative and Judicial Responses to Furman* v. *Georgia: An Analysis and Criticism,* 2 Fla. St. L. Rev. 108, 144 (1974) (footnotes omitted).

There is no meaningful communication between the advisory jury and the sentencing judge as to the facts the jury has found, discounted, treated as "aggravating," treated as "mitigating," rightly or wrongly considered important or dismissed as irrelevant.[34]

(b) *The uncertain importance of the advisory verdict.*

At the trial level at least, sentence is finally imposed by the judge; but it is uncertain what weight he is to give to the jury's advisory sentencing verdict. "In some instances [the advisory verdict] . . . could be a critical factor in determining whether or not the death penalty should be imposed," *LaMadline* v. *State,* 303 So.2d 17, 20 (Fla. 1974); but presumably, in other undefined circumstances, it is not. In *Tedder* v. *State,* 322 So.2d 908, 910 (Fla. 1975), the Florida Supreme Court declared:

> "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

But the *Tedder* "standard" has been as frequently ignored as used.[35] In neither *Sawyer* v. *State,* 313 So.2d 680 (Fla. 1975), nor *Gardner* v. *State,* 313 So.2d 675 (Fla. 1975), discussed at pages 48-49 *infra,* can it be said that "the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ" with the trial judge's overruling of a jury's recommendation of mercy.[36] And *cf. Swan* v. *State,* 322 So.2d 485 (Fla. 1975), discussed at pages 49-50 *infra.* Of course, an intractable difficulty in making the kind of assessment implied in *Tedder* is that it is not possible for a trial court to *know* "the facts" which the jury found, considered, or rejected. *See* pages 37-38 *supra.*

The relationship between the jury's recommendation and the trial court's sentence is further complicated by the fact

---

[34] *Cf. Halliwell* v. *State,* 323 So.2d 557, 561 (Fla. 1975): "We cannot read the minds of jurors, but it is reasonable to suspect that the hideous and gruesome conduct of Appellant in dismembering the body several hours after the murder probably was considered by the jury in recommending the death penalty."

[35] The "standard," if it is such, seems to govern only half of the relationship between trial judge and jury. In *Thompson* v. *State,* Fla. Sup. Ct. No. 45,107, decided January 21, 1976, the Florida Supreme Court announced that "[i]t stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment." Slip op. at 7. Why this proposition "stands to reason" if the appellate court's task is to develop a rational set of capital sentencing standards is unclear. Arbitrariness in the operation of the Florida law may consist as much in capricious grants of mercy (which are denied to some defendants but given to others) as in capricious exercises of severity. *See* BLACK, CAPITAL PUNISHMENT, THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974), quoted in Brief for Petitioner, *Fowler* v. *North Carolina,* No. 73-7031, at pp. 76-77 n.116.

[36] In *Dobbert* v. *State,* Fla. Sup. Ct. No. 45,558, decided January 14, 1976, the defendant was convicted of the first degree murder of his nine year old daughter, the second degree murder of his seven year old son, and the child abuse of two others of his children. The jury recommended a life sentence on the first degree murder count; the trial judge imposed a death sentence; and a majority of the Florida Supreme Court affirmed. Mr. Justice England declared in dissent that he would have reversed the death sentence on the basis of *Tedder*: "Applying that standard here, I would hold that reasonable persons could disagree with the trial judge and that the jury's recommendation of life imprisonment should be adopted." "As the majority observes, by imposing and discussing the basis for consecutive sentences the trial judge anticipated the possibility that reasonable people could differ with him." *Dobbert* v. *State, supra,* slip. op. at 21 and No. * *supra.* The majority in *Dobbert* did not cite *Tedder;* and Mr. Justice Overton wrote separately to say that he had applied the *Tedder* standard and found it met, *State* v. *Dobbert, supra,* slip op. at 20.

that a presentence investigation report may be prepared—or may not, as the judge chooses—*after* the jury's advisory verdict, and may form a part of the factual basis on which the final life-or-death decision is based. *See* note 18 *supra*. *Cf.* HUIE, THE EXECUTION OF PRIVATE SLOVIK 172-173 (5th Dell ed. 1974). Thus judge and jury may (or may not) pass the role of fact-finder back and forth as the deadly game of blindman's bluff progresses.

(c) *The uncertain role of the Florida Supreme Court.*

Death sentences imposed under the 1972 Florida statute are automatically reviewed by the Florida Supreme Court. Fla. Stat. Ann. §921.141(4) (1975-1976 supp.), *see* p. 9 *supra*. As conceived in *State* v. *Dixon, supra,* this appellate review is intended to provide one of several "concrete safeguards beyond those of the trial system to protect [a defendant] . . . from death where a less harsh punishment might be sufficient." *Id.,* 283 So.2d at 7.

> "[T]he sole purpose of . . . [this review] is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract [sic] the penalty of death for only the most aggravated, the most indefensible of crimes."

Id., 283 So.2d at 8.

No statutory standards of appellate review are provided;[37] and the Supreme Court of Florida has reviewed

[37] Pre-statutory Florida jurisprudence provides no guidance in this regard. Prior to the 1972 statute, the rule in Florida was that appellate courts lacked authority to reduce sentences on grounds of excessiveness. In *Davis* v. *State,* 123 So.2d 703, 707 (Fla. 1960), for example, the Florida Supreme Court declined to reduce the death sentence of a defendant condemned for rape, ruling that "[i]n a long adhered to line of cases, we have held that where a

the death sentences on both procedural[38] and substantive[39] grounds. In *Songer* v. *State,* 322 So.2d 481, 484 (Fla. 1975), the court emphasized that "[w]hen the death penalty has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted." (Footnote omitted.)

The court has, however, adopted a number of vague, somewhat differing tests to determine whether a sentence of death is "warranted" in particular cases. In *State* v. *Dixon, supra,* 283 So.2d at 7, the court defined its role as assuring that the death penalty would be applied "to only the most aggravated and unmitigated of most serious crimes."[40] In *Halliwell* v. *State,* 323 So.2d 557, 561 (Fla. 1975), it indicated that on the appeal of a death sentence, it would "[a]s required by statute . . . weig[h] both the aggravating and the mitigating circumstances as shown in the record." This approach was taken also in *Swan* v. *State,* 322 So.2d 485, 489 (Fla. 1975), where the court

sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or non-existence of mitigating circumstances. . . . [The statute setting the penalty for rape] fixes the maximum penalty for the offense of the appellant at death, and since this is within the statutory limit, it is not reviewable." *See also Brown* v. *State,* 152 Fla. 853, 13 So.2d 458, 461-62 (1943); *DeLoach* v. *State,* 232 So.2d 765, 766 (Fla. 1970); *La Barbera* v. *State,* 63 So.2d 654, 654-655 (Fla. 1953); *La Prell* v. *State,* 124 So.2d 18, 19 (Fla. App. 1960).

[38] *Taylor* v. *State,* 294 So.2d 648, 651 (Fla. 1974): "From our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute and found in the record."

[39] *E.g., Tedder* v. *State,* 322 So.2d 908 (Fla. 1975). *See* page 49, *infra*.

[40] In *Thompson* v. *State,* Fla. Sup. Ct. No. 45,107, decided January 21, 1976, the court repeated "that it was the legislative intent to extract [sic] the penalty of death for only the most aggravated and the most indefensible of crimes." Slip op. at 7.

avowedly engaged in a plenary weighing of sentencing factors: "[h]aving considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty." The court had earlier examined the record to discern whether "[t]he State offered . . . [anything] to show the *necessity* for electrocution." 322 So.2d at 488 (emphasis added). Yet in *Thompson* v. *State,* Fla. Sup. Ct. No. 45,107, decided January 21, 1976, the court concluded only that it "[found] no objection to the jury's determination," slip op. at 7. The formulation in *Alvord* v. *State,* 322 So.2d 533, 540 (Fla. 1975), was that "[i]t is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment was too great."

Other than these pronouncements, no standards of appellate review have emerged from the nineteen cases in which the Florida Supreme Court has reviewed death penalties imposed under the new statute.[41] All that is clear is that the court has affirmed twelve death sentences and reversed seven death sentences.[42] None of its written opinions for

[41] *Darden* v. *State,* Fla. Sup. Ct. No. 45,108 & 45,056 (February 18, 1976); *Douglas* v. *State,* Fla. Sup. Ct. No. 44,864 (February 18, 1976); *Thompson* v. *State,* Fla. Sup. Ct. No. 45,107 (Jan. 21, 1976); *Dobbert* v. *State,* Fla. Sup. Ct. No. 45,558 (Jan. 14, 1976); *Halliwell* v. *State,* 323 So.2d 557 (Fla. 1975); *Tedder* v. *State,* 322 So.2d 908 (Fla. 1975); *Alvord* v. *State,* 322 So.2d 533 (Fla. 1975); *Songer* v. *State,* 322 So.2d 481 (Fla. 1975); *Swan* v. *State,* 322 So.2d 485 (Fla. 1975); *Slater* v. *State,* 316 So.2d 539 (Fla. 1975); *Proffitt* v. *State,* 315 So.2d 461 (Fla. 1975); *Sawyer* v. *State,* 313 So.2d 680 (Fla. 1975); *Gardner* v. *State,* 313 So.2d 675 (Fla. 1975); *Spinkellink* v. *State,* 313 So.2d 666 (Fla. 1975); *Alford* v. *State,* 307 So.2d 433 (Fla. 1975); *Hallman* v. *State,* 305 So.2d 180 (Fla. 1974); *Sullivan* v. *State,* 303 So.2d 632 (Fla. 1974); *LaMadline* v. *State,* 303 So.2d 17 (Fla. 1974); *Taylor* v. *State,* 294 So.2d 648 (Fla. 1974). *See also, State* v. *Dixon,* 283 So.2d 1 (Fla. 1973) (pre-trial certification).

[42] *See* Appendix A, *infra.*

affirmance assays the slightest explanation of why "a less harsh penalty [is not] . . . sufficient," *State* v. *Dixon, supra,* 283 So.2d at 7; nor has the court offered the meagerest explication of any other reasoned *principle* of decision.[43] Without the articulation of any standards, without the enunciation of a reasoned opinion on the sentencing question, without analysis of the significance of factual elements thought to justify (or not to justify) the sentence under review, it is far from apparent how the Florida Supreme Court can assure that the death sentence is being inflicted "for only the most aggravated, the most indefensible of crimes." *Id.* at 7.[44]

[43] The Florida Supreme Court's manner of announcing its sentencing review findings has varied considerably. Often, the court simply announces the result without any explication. *E.g. Songer* v. *State,* 322 So.2d 481 (Fla. 1975); *Sullivan* v. *State,* 303 So.2d 632 (Fla. 1974). Sometimes the court simply quotes the sentencing findings of the trial judge. *E.g., Proffitt* v. *State,* 315 So.2d 461 (Fla. 1975); *Gardner* v. *State,* 313 So.2d 675 (Fla. 1975); *Hallman* v. *State,* 305 So.2d 180 (Fla. 1974). In a very few cases, the court has undertaken to compare the case under review with other capital cases. *Alford* v. *State,* 307 So.2d 433 (Fla. 1975); *Alvord* v. *State,* 322 So.2d 533 (Fla. 1975).

[44] The deficiencies in the 1972 capital punishment procedures, discussed above, nullify, of course, any rational appellate review. In *Taylor* v. *State,* 294 So.2d 648 (Fla. 1974), for example, the Florida Supreme Court reversed a death penalty imposed by the trial judge against the jury's recommendation of mercy. The court relied on the advisory verdict (the reasons for which were unintelligible, since it consisted of a simple recommendation that the defendant be sentenced to life imprisonment), and it speculated concerning the reasons the jury *could* have found to justify its verdict. 294 So.2d at 652. It declared that "[a]ll of this [the mitigating circumstances which might possibly have been found] taken together could have *substantially impaired* the rationality of appellant to the point where the jury, believing his complicity, nevertheless rejected the idea of the imposition of the ultimate penalty. We find no objecton to the jury's determination." 294 So.2d at 651-652 (emphasis in original). Florida's capital procedures insured that the Court had to guess at the reasons for the jury's verdict—the jury might have made its decision for the surmised

But even if it could do this, it could *not* assure that life sentences were not being meted out capriciously and in overwhelming numbers for precisely the same "most aggravated, . . . most indefensible . . . crimes." For in Florida, there is no appellate review of a trial judge's imposition of a life sentence in a first degree murder case; such cases are not appealable as of right to the Florida Supreme Court; they may not be appealed at all; and there is still less likelihood that the Florida Supreme Court will ever see the many cases involving lesser-included-offense convictions[45]—frequently resulting from pleas of guilty—all of which make up the record of the way in which Florida's 1972 death penalty is being administered. Consequently, another "infirmity in Florida's appellate review provision is that review by the supreme court cannot protect against arbitrary mitigation of the death penalty at the trial court level . . . . [E]ven if all those executed are found by the supreme court to be guilty of the most 'aggravated' and 'indefensible' crimes, some of those spared at the trial

---

reasons, or for no reasons at all. The rationale for its verdict was unknown and unknowable by the Supreme Court which relied upon that verdict.

See pages 46-48, *infra*.

[45] The Florida Supreme Court noted in *State* v. *Dixon, supra,* 283 So.2d at 8: "[c]ases involving life imprisonment [are] . . . not directly reviewable by [the Florida Supreme] . . . Court, and the District Courts of Appeal [are] . . . not . . . empowered to overturn the trial judge on the issue of sentence." Mr. Justice England has pointed out that "[t]he statute defies uniformity at the outset by limiting our review to only the capital cases where the judge imposes death." *Alvord* v. *State,* 322 So.2d 533, 542, n.11 (Fla. 1975) (dissenting opinion). "Since we do not have jurisdiction to review capital cases resulting in a sentence of life imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases." *Id.* at 542 n.2.

court level may also be guilty of that same quality of criminal activity." [46]

4. The Results of "Trifurcation": Caprice and Arbitrariness.

Dissenting from the affirmance of a death sentence in *Alvord* v. *State,* 322 So.2d 533, 541-542 (Fla. 1975), Mr. Justice England wrote:

> "Under the multiple views expressed in *Furman* v. *Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the selective, arbitrary imposition of the death penalty is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. I believe our death sentence statute fosters rather than avoids the proscribed unbridled discretion. I share the views of our statute which were expressed by Mr. Justice Ervin and Mr. Justice Boyd in *State* v. *Dixon,* 283 So.2d 1, 11, 23 (Fla. 1973) (dissenting). I can now add to their analyses that Florida's experience under the statute proves their perceptions correct.
>
> "Since the sentencing statute was enacted, we have reviewed several capital felony cases in which the death sentence could have been imposed. These cases range from love triangle deaths to execution-type slayings. In two decided cases a jury recommended life, the judge imposed a death sentence, and we affirmed his sentence. In four decided cases a jury recommended death, the judge concurred, and we affirmed. In one decided case the defendant entered a guilty plea, no jury recommendation was received (for which deficiency we reversed), and the judge imposed a sentence

---

[46] Note, *Florida's Legislative and Judicial Responses to Furman* v. *Georgia: An Analysis and Criticism,* 2 FLA. St. L. REV. 108, 147 (1974) (footnotes omitted).

of death. In another case a jury recommended and the judge sentenced life imprisonment. In still another, a jury recommended, the judge sentenced and we affirmed a death sentence, while an accomplice was allowed a life sentence on the basis of a plea bargain for his testimony.

"Perhaps it would be possible to analyze each of these cases, together with those life sentences we have never reviewed, and concluded that Florida's trifurcated sentence procedure exhibits a non-discriminatory pattern consistent with the dictates of *Furman*. I cannot, however. I believe our statute will produce *Furman*-prohibited arbitrariness so long as human discretion is injected into one, let alone three, stages of the sentencing process." (Footnotes omitted.)

The life-and-death results in particular cases that have come to judgment under the 1972 Florida death penalty statute completely bear out Mr. Justice England's conclusion. There are now three capital lotteries in Florida:

First, a defendant takes his chances before an advisory sentencing jury which, for untold and untellable reasons, makes a recommendation as to whether he will live or die. Statistics do not appear to have been collected concerning the proportion of capital cases in which the jury has recommended mercy and the judge has concurred.

Second, the trial judge imposes sentence, independently but (somehow) influenced by the jury's advisory verdict. In *State* v. *Dixon, supra,* 283 So.2d at 8, the Florida Supreme Court emphasized that the trial judge's power to overrule the jury's recommendation would correct for laymen's outrage at capital crime:

> "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts

> of the case against the standard [of?] criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience." [47]

But for some defendants at least, the trial judge's sentencing power has proved to be another running of the gauntlet: out of 70 Florida defendants who have been sentenced to death under the new statute[48] at least 20 have been condemned by a trial judge following his rejection of a jury's recommendation of life imprisonment.[49] The Florida Supreme Court has reversed five such death sentences, *Tedder* v. *State,* 322 So.2d 908, 910 (Fla. 1975); *Slater* v. *State,* 316 So.2d 539, 542 (Fla. 1975); *Thompson* v. *State,* Fla. Sup. Ct. No. 45,107, decided January 21, 1976, slip opinion at 7; *Swan* v. *State,* 322 So.2d 485, 489 (Fla. 1975); *Taylor* v. *State,* 294 So.2d 648, 652 (Fla. 1974);[50] and has affirmed four such death sentences, *Gardner* v. *State,* 313 So.2d 675 (Fla. 1975); *Sawyer* v. *State,* 313 So.2d 680 (Fla. 1975); *Dobbert* v. *State,* Fla. Sup.Ct. No. 45,558, decided January

---

[47] Thus, although all capital crimes were likely to seem "no . . . less than heinous" to laymen, 283 So.2d at 8, trial judges could be counted on to take a more discriminating view, *ibid.*

[48] See Appendix A, *infra,* for a list of the death sentences which have been imposed under the statute as of February 1, 1976.

[49] Trial judges disregarded jury recommendations of life imprisonment and imposed the death penalty in the *Taylor, J. Jones, Sawyer, Douglas, McCaskill, Williams, Thompson, Gardner, Swan, Burch, Slater, Dobbert, McCray, Tedder, Provence, Buckrem, H. Brown, Chambers, L. Jones,* and *Carnes* cases; the death penalty was imposed without any jury recommendation in the *Holmes, LaMadline* and *Agen* cases after the defendants pleaded guilty; see Appendix A, *infra,* for the full citations of these cases.

[50] The death sentence in *Taylor* was reduced by the Florida Supreme Court on an unclear mixture of both substantive and procedural grounds, *see* note 44 *supra.*

14, 1976; *Douglas* v. *State,* Fla. Sup. Ct. No. 44,864, decided February 18, 1976; but it has developed no meaningful guidelines for trial court sentencing either where the jury does or does not recommend death. *See* pages 38-40, *supra.*

Third, the Florida Supreme Court reviews death sentences in the manner described at pages 40-45, *supra.* Because this is the stage of greatest visibility and constancy of personnel, it is particularly instructive to observe how it has worked. An examination of the death-sentencing decisions of that court discloses that, even here, different results have been reached in cases which are factually similar, and the Florida Supreme Court has reversed death sentences in cases that involve more aggravated factual circumstances than do some cases in which it has affirmed death sentences.

(1) The court affirmed a death sentence in *Gardner* v. *State,* 313 So.2d 675 (Fla. 1975), where appellant, in a drunken stupor, brutally beat his wife to death. The evidence revealed that appellant had been drinking heavily for the twenty-four hours before the killing, that he fell asleep with his wife's dead body, that he sought help for her the next morning "because his wife did not appear to be breathing properly," 313 So.2d at 679, that he made no attempt to escape, and that he exhibited remorse upon learning that his wife was dead. *See* 313 So.2d at 678-679. The jury recommended mercy, but the Florida Supreme Court affirmed the trial court's imposition of a death sentence. In dissent, Mr. Justice Ervin declared, "I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the death

penalty in this state.[51] . . . [T]his case involv[es] a crime of passion in a drunken spree." 313 So.2d at 679. The Court apparently discovered the force of Mr. Justice Ervin's point in *Tedder* v. *State,* 322 So.2d 908 (Fla. 1975), where it reversed the death penalty imposed upon a defendant (the trial court had overruled the advisory jury's verdict of mercy) who had fired several shots at his wife and mother-in-law during a marital dispute and killed the mother-in-law. Notably, this defendant had taken his wife away at gunpoint from her wounded mother: "[a]s they left, his wife saw her mother lying on the floor in a hallway. Appellant would not permit his wife to examine the body." *Tedder* v. *State, supra,* 322 So.2d at 909.[52]

(2) *Gardner* involved a gruesome beating, to be sure. But in *Swan* v. *State,* 322 So.2d 485 (Fla. 1975), the court vacated a death penalty imposed upon a burglar who, with a confederate, had administered a fatal "severe beating," 322 So.2d at 486, and "torture," 322 So.2d at 487, to a forty-nine year old female housekeeper who was in poor health. And in *Halliwell* v. *State,* 323 So.2d 577 (Fla. 1975), the court reversed a death sentence imposed upon a defendant who had been convicted of murdering his paramour's

---

[51] We have found in the Florida decisions for the year 1975 a number of second degree murder and manslaughter convictions in factual circumstances similar to the *Gardner* case. *See, e.g.,* second degree murder convictions (*Lattimore* v. *Florida,* 323 So.2d 5 (Fla. App. 1975); *Beasley* v. *State,* 315 So.2d 540 (Fla. App. 1975); *Smith* v. *State,* 314 So.2d 226 (Fla. App. 1975); *McCrae* v. *State,* 313 So.2d 429 (Fla. App. 1975); *Noel* v. *State,* 311 So.2d 182 (Fla. App. 1975); *Melero* v. *State,* 306 So.2d 603 (Fla. App. 1975)); manslaughter convictions (*Hanna* v. *State,* 319 So.2d 586 (Fla. App. 1975); *Calvo* v. *State,* 313 So.2d 39 (Fla. App. 1975); *Robbins* v. *State,* 312 So.2d 243 (Fla. App. 1975)). *Gardner* appears to be the only case in this year where the slaying of a spouse or lover by the defendant was capitally punished, whatever the aggravation.

[52] Appellant Tedder's mother-in-law died from gunshot wounds twenty-eight days later. *Ibid.*

husband. Defendant had beaten the victim to death with an iron bar and had then hacked the body into several pieces. The Florida Supreme Court reversed the death penalty which had been recommended by the jury and imposed by the trial judge, ruling that "a finding of premeditated murder [was justified], but we see nothing more shocking in the actual killing [as distinguished from the subsequent dismemberment] than in a majority of murder cases reviewed by this Court." 323 So.2d at 561.[53]

(3) The facts of *Taylor* v. *State*, 294 So.2d 648 (Fla. 1974), and *Sawyer* v. *State*, 313 So.2d 680 (Fla. 1975), unquestionably differ in some regards (as do the facts in any two cases), but the differences hardly seem commensurate with differences between life and death.[54] In both

[53] As in *Taylor* v. *State*, *supra*, note 44, the court speculated concerning the reasons for the jury's advisory verdict of death: "We cannot read the minds of jurors, but it is reasonable to suspect that the hideous and gruesome conduct of Appellant in dismembering the body several hours after the murder probably was considered by the jury in recommending the death penalty." *Halliwell* v. *State*, *supra*, 323 So.2d at 561.

[54] *Taylor* v. *State*, 294 So.2d 648, 649 (Fla. 1975):

> "The evidence presented at trial established that the defendant, in the company of two other males, entered a 'package store' owned and operated by Larry Phillips and his 72 year old father, the decedent, Max Phillips. The defendant, with pistol in hand, jumped over the counter after ordering an employee and a customer to lie face-down on the floor. During an ensuing struggle between the defendant and Max Phillips, Larry Phillips drew a pistol from beneath the counter and shot the defendant in the abdomen. . . .
>
> "Larry Phillips testified that he heard a shot strike the bottles on the shelf near him as he attempted to activate a silent alarm in the rear of the store. Other shots were fired, three of which struck and killed Max Phillips. The fatal shot was shown to have entered the body of the decedent on a downward trajectory. The pistol used by Phillips was shown to have not fired the bullets which killed the decedent. The weapon carried by the defendant, Taylor, was never located, nor was the murder weapon found."

cases, black defendants were convicted of slaying white liquor store clerks during the course of an armed robbery. In both cases, more than one armed robber participated in the crime,[55] and there was forcible resistance by the store personnel. In neither case was it established that the defendant intentionally shot the victim.[56] In both cases, the sentencing juries unanimously recommended life imprisonment, and the trial court imposed the death penalty. Yet

Sawyer v. *State*, 313 So.2d 680 (Fla. 1975):

> "The facts are as follows: On January 12, 1973, the appellant and two other individuals entered a liquor store in Dade County, Florida, for the purpose of perpetrating a robbery. The appellant, with a revolver in his hand, directed the proprietor's son to turn over all the money. The son turned over the money in the cash register, and then the appellant pushed the son into the back room, questioning him with regard to 'the rest of it.' At this point, the son, his father and appellant were in the back room together. The wife of the proprietor picked up a bottle of whisky and, while standing behind the appellant, struck him over the head with it. Simultaneously, the owner grabbed the appellant around the chest in an attempt to subdue him. During the struggle, the gun which the appellant was holding discharged twice, striking the son and causing his death. The owner released appellant, . . . and the appellant fled the store."

[55] Sawyer's two co-defendants, Dixon and Lester, were subsequently acquitted of complicity in this felony-murder. *State* v. *Dixon*, Dade County Cir. Ct. No. 73-1001-A (verdict-January 11, 1974); *State* v. *Lester*, Dade County Cir. Ct. No. 73-1001-B (verdict-November 6, 1975).

[56] In *Taylor*, the evidence clearly suggested that the defendant did not fire the fatal shot. *Taylor* v. *State*, *supra*, 294 So.2d at 652. In *Sawyer*, the fatal shot was fired from appellant's gun during a struggle with someone who was *not* the victim of the shooting. *Sawyer* v. *State*, *supra*, 313 So.2d at 680. *See* note 54 *supra*. Under the established doctrine of felony-murder, of course, no finding of intent or premeditation is necessary to justify a conviction for first degree murder, *see, e.g.*, *Jefferson* v. *State*, 128 So.2d 132, 136 (Fla. 1961), and one felon may be held vicariously liable for an unintentional killing by a co-felon, a police officer, or a person resisting the felony during the course of the felony. *See, e.g.*, *Hornbeck* v. *State*, 77 So.2d 876, 878-879 (Fla. 1955); *Griffith* v. *State*, 171 So.2d 597, 597-598 (Fla. App. 1965).

in one case, the Florida Supreme Court reversed the death penalty, and in the other, it affirmed the trial court's sentence on the basis of "aggravating circumstances" not specified in the Florida capital punishment statute, *see* pages 29-31, *supra*. These latter circumstances show that Anthony Sawyer—like Titus Oates—was a very bad man (although he had not been convicted of the various non-capital offenses with which he was charged); but the Florida Supreme Court had earlier said that the death penalty was to be reserved for the "most aggravated [and] . . . indefensible of crimes," [57] not the most aggravated and indefensible of people.

(4) Again, the court vacated a death penalty in *Halliwell* v. *State*, pages 49-50 *supra*, imposed for a gruesome slaying found by the trial court to be "especially heinous, atrocious or cruel" and found by the advisory jury to be deserving of death. The court affirmed a death penalty in *Spinkellink* v. *State*, 313 So.2d 666 (Fla. 1975), on the basis of a similar finding by the trial court and recommendation by the jury in a less aggravated case where there had been considerable provocation for the killing. In *Spinkellink*, the defendant had picked up the deceased, who was hitchhiking; "both men had criminal records, and both were heavy drinkers." 313 So.2d at 668. "During their travels Appellant [Spinkellink] learned first hand of Szymankiewicz's [the deceased's] vicious propensities when the latter forced him to have homosexual relations with him, when the latter played 'Russian Roulette' with him and boasted of killing a fellow inmate while in prison. After checking into a motel in Tallahassee, Appellant [Spinkellink] discovered that his traveling companion had relieved him of his cash reserves." *Ibid.* Spinkellink returned to recover

[57] *State* v. *Dixon*, 283 So.2d 1, 8 (Fla. 1973), quoted at page 25 *supra*.

his money, and Szymankiewicz was later found dead in the motel room, shot twice with his own pistol, perhaps while sleeping. Spinkellink was subsequently convicted of Szymankiewicz' murder. *Ibid.* The Florida Supreme Court noted that "while admitting that he had fired the gun that killed Szymankiewicz, Appellant [Spinkellink] sought to show mitigating circumstances by showing, first, that he was carrying the gun [of Szymankiewicz] because he was afraid for his own life, and secondly, that the gun discharged during a fight between the two." *Ibid.* Although the Court stated that "[a]dmittedly, the evidence clearly shows that the deceased was an individual of vicious temperament and that Appellant [Spinkellink] was justified in concluding that he would do well to sever their relationship," 313 So.2d at 670, it rejected Spinkellink's claim that the factual circumstances of his relationship with the deceased and his putative self-defense claim established any mitigating circumstances.[58]

[58] Mr. Justice Ervin wrote in dissent, 313 So.2d at 673:

"[i]n this case it appears that Appellant at the time of the homicide was a 24-year-old drifter who picked up Szymankiewicz [the deceased], a hitchhiker. Both had criminal records and both were heavy drinkers. Szymankiewicz, the victim in this case, was a man of vicious propensities who boasted of killings and forced Appellant to have homosexual relations with him. Appellant discovered that Szymankiewicz had 'relieved him of his cash reserves.'

"It was under these conditions that Appellant returned to the motel room where the homicide occurred. Appellant testified he shot Syzmankiewicz in self-defense. Evidence to the contrary was only circumstantial. In fact, only through such evidence was it possible to infer the crime was premeditated and different from Appellant's direct testimony that he shot Szymankiewicz in self-defense. The reasoning of this Court on the suddenness in which premeditation may be found is suspect and allowed the prosecution undue latitude to readily shift from the theory of felony murder to premeditated murder.

"It does not appear to me that in this situation there was sufficient certainty of premeditated guilt and heinousness to warrant the death penalty. When the nature of the relation

5. The Death Sentence Imposed Upon Petitioner Was Characteristically Arbitrary.

The vagaries of Florida's 1972 death penalty statute are manifest in petitioner's case. On the basis of the trial testimony, of an otherwise undescribed 1967 Connecticut conviction for "the crime of breaking and entering without permission," R. 494,[59] and of the testimony of Dr. James Crumbley, a medical doctor who was not a psychiatrist,[60]

---

between Appellant and Syzmankiewiz is taken into account, along with the viciousness of the victim's character and his theft of Appellant's money, it is obvious that hostility existed between them that could have produced a mortal encounter that involved self-defense shooting."

[59] Apparently the relevance of this conviction was to "primarily negat[e]" the "mitigating circumstance" set forth in Fla. Stat. Ann. §921.141(6)(a): that "[t]he defendant has no significant history of prior criminal activity." *See* pp. 32-34 *supra*. Under Fla. Stat. Ann. §921.141(5)(b) it is an "aggravating circumstance" that [t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." But the state did not claim that the Connecticut conviction qualified as such an "aggravating circumstance," and it did not elucidate the underlying facts of this 1967 crime.

[60] Dr. Crumbley served as "a consultant to the Sheriff's Department for diagnostic problems" (R. 496-497) and had interviewed petitioner twice for "[a]pproximately fifteen or twenty minutes" (R. 501). Dr. Crumbley testified that petitioner revealed to him that he "had this uncontrollable desire which built up to a terrific degree of unbearable tension for [sic] which he fought as hard as he could and, finally, one evening after work on the way home the uncontrollable desire came again that was of such intensity that he knew that he must kill someone." (R. 498.)

"Q. [Assistant State Attorney] Is it your opinion that based on his statements to you that this man is a dangerous man could be a danger in the future to society?

A. [Dr. Crumbley] Absolutely.

Q. He could also be a danger to other inmates of any facility for incarceration?

A. Yes, he could."

(R. 500.) On cross-examination, however, Dr. Crumbley's testimony took a new turn in response to questions which sought to

the jury rendered an advisory sentencing verdict which stated simply, "[a] majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Charles William Proffitt." (R. 491.)

The trial court then ordered petitioner examined by two psychiatrists (R. 536) and subsequently sentenced him to death on the basis of four "aggravating circumstances (R. 57-58) and a finding that the statutory "mitigating circumstances" were "primarily negated" (R. 58.) The court concluded that it found "that aggravating circumstances do exist, and that these aggravating circumstances *far outweigh* any circumstances which would mitigate the sentence in this case." *Ibid.* (emphasis added). "The Court finds that the Defendant, CHARLES WILLIAM PROFFITT, has been and would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution." (R. 59.)

One of the "aggravating circumstances" found by the trial court was that the murder of Joel Ronnie Medgebow

---

establish the existence of three mitigating circumstances: that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (Fla. Stat. Ann. §921.141(6)(b)); that "[t]he defendant acted under extreme duress or under the substantial domination of another person" (Fla. Stat. Ann. §921.141(6)(e)); and that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" (Fla. Stat. Ann. §921.141(6)(f)). Dr. Crumbley testified that at the time of the interview, petitioner was seeking "psychiatric treatment" (R. 503), that when petitioner committed the crime, "I am certain that this individual was under an intense amount of uncontrollable emotional stress," and "couldn't help" doing what he did *(ibid.)*, and that petitioner's condition could be treated so that he was no longer "a danger to society or to fellow inmates" (R. 504.) Dr. Crumbley concluded, "I'm certain that at the moment and at the time that this occurred this individual was overwhelmed with the force over which he had no control and to which he must carry out the deed . . . [s]o that he was unable to conform his conduct to the requirements of law." *(Ibid.)*

was "especially heinous, atrocious or cruel." (R. 57.) While, in a very real sense, "all killings are atrocious," *Tedder* v. *State,* 322 So.2d 908, 910 (Fla. 1975), the slaying here (involving one stab wound to the heart) cannot plausibly be said to entail "something 'especially' heinous, atrocious or cruel." *Tedder* v. *State, supra,* 322 So.2d at 910 (footnote omitted). It clearly did not involve acts which were "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others," which "set the crime apart from the norm of capital felonies—[a] . . . conscienceless or pitiless crime . . . unnecessarily torturous to the victim," *State* v. *Dixon, supra,* 283 So.2d at 9. *Cf. Swan* v. *State,* 322 So.2d 485 (Fla. 1975), discussed at page 59 *infra; Halliwell* v. *State,* 323 So.2d 557 (Fla. 1975), discussed at pages 49-50 *supra.*

The trial court also found as an "aggravating circumstance" that petitioner had a "propensity" to commit a crime for which he was convicted and that he constituted a "danger and a menace to society." (R. 57.) This particular "aggravating circumstance" appears nowhere in the Florida statute, of course; it is one of the open-ended roster of *ad hoc* justifications for imposing a death sentence that Florida trial judges are free to invent. *See* pages 29-31 *supra.* Moreover, the determination that petitioner had a "propensity" to commit murder and that he was a "menace to society" is not supportable on the record.[61] It is merely

[61] While Dr. Crumbley stated that petitioner "could be a danger in the future to society" (R. 500), this doctor—who was not a psychiatrist—also indicated that petitioner's condition was susceptible to treatment which would make him no longer "a danger to society." *See* note 60 *supra.*

At a second sentencing hearing after the advisory jury had been discharged, Dr. Robert H. Coffer, a psychiatrist who had been appointed by the trial court to examine petitioner, testified that he had given petitioner a "regular diagnostic interview" (R. 543) which had lasted approximately fifty minutes (R. 544). Dr. Coffer concluded that petitioner "knew the difference between right and wrong" on the day of the crime (R. 545) and had "the capacity . . . to appreciate the criminality of his conduct . . . [and] to conform his conduct to the requirements of law." *(ibid.)* He did not address the question whether petitioner was a "danger" or a "menace" to society. On cross-examination, he stated that petitioner was affected by "a personality disorder, a tendency to act out his feelings" (R. 547) and that petitioner would not "improve much with treatment" (R. 549). Dr. Coffer observed that petitioner did not indicate any desire "to repeat the kind of act which occurred on the 10th" or "an urge to continue killing people" (R. 550).

The second psychiatrist appointed by the trial court, Dr. Daniel J. Sprehe, did not testify but his report indicated that petitioner had admitted during his interview with Dr. Sprehe that he had "a long standing compulsion to kill someone." (R. 44.) Dr. Sprehe concluded that petitioner had a long standing sociopathic personality characterized by resort to violence as a solution to his life problems" *(ibid.),* but he did not address his question whether petitioner's personality disorder could be successfully treated.

There is, of course, extraordinary disagreement among medical experts and social scientists concerning the extent to which it is possible to make reliable predictions of future anti-social behavior by a particular individual. *See* Brief for Petitioner, *Jurek* v. *Texas,* No. 75-5394 at Part II. Perhaps that is why no one in this case, except the trial judge, ventured to prediction that petitioner would repeat the crime of murder.

a visceral reaction verbalized as a justification for sentencing petitioner to death.

The finding as an "aggravating circumstance" that petitioner knowingly created a great risk of serious bodily harm and death to many persons" (R. 206-207) is a hybrid. The *statute* contains the aggravating circumstance of knowingly creating a great risk of "death" to many persons (Fla. Stat. Ann. §921.141(5)(c), page 9 *supra*); and the trial judge used his plenary power to add "serious bodily harm." In any event, the finding is baseless either as a statutory or nonstatutory aggravating circumstance. The relevant subsection of the statute is directed at wanton and serious endangering of the general public, as by exploding a bomb in a public place, shooting into a crowd, or hijacking an airplane. Indeed, in a hearing before the Select Com-

mittee on the Death Penalty of the Florida House of Representatives, Committee Chairman Jeff D. Gautier summarized this provision: "[t]he defendant knowingly created risk of death to many persons. That's your hijacking sections [sic]."[62] But even conceding the trial court's power to ignore the statute (see pages 29-31 *supra*), it surely beggars reason and deprives language of intelligible meaning to find that petitioner created a great risk of death or serious bodily harm to many people. Joel Medgebow's killer came into contact with *one* other person besides the victim during the course of the crime, and he used a *knife* only against Mr. Medgebow.

There was adequate evidence to sustain the finding of the fourth "aggravating circumstance" listed by the trial judge: that Mr. Medgebow's murder was committed during the felony of burglary. (R. 57.) But this one supportable finding hardly lends integrity to the final result, which the statute requires to be reached by assessing the sufficiency of all aggravating circumstances to justify a death sentence. Three of the four aggravating circumstances cited by the trial judge here are, to use the apt words of Professor Charles Black, either "caprice" or "mistake" or both.[63] Moreover, there is nothing in the record to explain why this particular felony murder is any more aggravated than the many in which life sentences have been imposed[64]

[62] *Hearings*, Select Committee on the Death Penalty, Florida House of Representatives, at 66 (Aug. 4, 1972).

[63] Black, *op. cit. supra* note 35, at 18-20.

[64] *See, e.g., Hernandez* v. *State*, 323 So.2d 318 (Fla. App. 1975); *Wilson* v. *State*, 306 So.2d 513 (Fla. 1975); *Miller* v. *State*, 300 So.2d 53 (Fla. App. 1974); *Jefferson* v. *State*, 298 So.2d 465 (Fla. App. 1974); *Williams* v. *State*, 297 So.2d 67 (Fla. App. 1974); *Dinkens* v. *State*, 291 So.2d 122 (Fla. App. 1974); capital defendants have also been convicted of second degree murder in felony murder situations, *see, e.g., Ballard* v. *State*, 323 So.2d 297 (Fla. App. 1975); *Gilbert* v. *State*, 311 So.2d 385 (Fla. App. 1975).

or in which the Florida Supreme Court has vacated death sentences. *See, e.g., Swan* v. *State*, 322 So.2d 485 (Fla. 1975); *Slater* v. *State*, 316 So.2d 539 (Fla. 1975); *Thompson* v. *State*, Fla. Sup. Ct. No. 45,107 (Jan. 21, 1976). In *Swan*, for example, the defendant and a companion burglarized a home at night and gave the housekeeper such a "severe beating," 322 So.2d at 486, that she died from "the torture . . . administered," 322 So.2d at 487. The Florida Supreme Court nevertheless held that considering "the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty." 322 So.2d at 489.

• • •

Despite the mandate of *Furman* v. *Georgia*, petitioner remains simply one of "a capriciously selected random handful upon whom the sentence of death has in fact been imposed,"[65] while the same sentence of death has been averted from others under Florida's 1972 statutory procedures with "no meaningful basis for distinguishing" the spared from the condemned.[66] This case does not therefore necessitate resolution of the question whether, in the words of Chief Justice Burger's *Furman* dissent, "there is [any] . . . reason to believe that sentencing standards in any form will substantially alter the discretionary character of the [pre-*Furman*] . . . system of sentencing in capital cases."[67] *See also McGautha* v. *California*, 402 U.S. 183, 208 (1971); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 174 (H.M.S.O. 1953) [Cmd. 8932]. For the Florida Supreme Court itself has described Florida's "standards" and procedures in a way that makes their incompatibility with *Furman* palpable:

[65] *Furman* v. *Georgia*, *supra*, 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

[66] *Id.* at 313 (concurring opinion of Mr. Justice White).

[67] *Id.* at 401.

> "[c]ertain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case."

Alvord v. *State,* 322 So.2d 533, 540 (Fla. 1975).

B. *Before and After the Penalty Trial.*

But what we have said so far is only a part of the story, because the sentencing discretion explicitly authorized by this 1972 statute is but one of several points at which arbitrariness riddles the procedures determining who lives and dies for "capital" crime in Florida. The capricious administration of death that results from unfettered prosecutorial charging and plea bargaining powers, from jury sympathy or revulsion as they affect the jurors' determinations of degrees and grades of offenses, and from the executive's prerogative of clemency has been described at length in the Brief for Petitioner, *Fowler* v. *North Carolina* No. 73-7031, at 41-101 [hereafter cited as Petitioner's *Fowler* Brief]. We will not burden the Court with a recapitulation of that documentation here. Suffice it to sum up with the Government's apt conclusion regarding the way in which systems of "capital" justice generally function in this country today: "[t]hose [capital defendants] whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared." Brief for the United States as *Amicus Curiae, Fowler* v. *North Carolina,* No. 73-7031, at 75-76.

In the following subsections, we do no more than to describe the particular Florida-law doctrines, practices and procedures which pave the local stretches of the "avenues of mercy" to which the Government refers. We respectfully hope that the Court will consent to consider these subsections in connection with the fuller discussions found in Petitioner's *Fowler* Brief of (1) prosecutorial charging discretion (*id.* at 45-53); (2) plea bargaining (*id.* at 53-61); (3) jury discretion (id. at 62-95); and (4) executive clemency (*id.* at 95-100). Parallel local-law sections will be found in the Briefs for Petitioners in *Roberts* v. *Louisiana,* No. 75-5844, and *Jurek* v. *Texas,* No. 75-5394, and in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as *amicus curiae* in *Gregg* v. *Georgia,* No. 74-6257.

1. Prosecutorial Charging Discretion.

In Florida, each State Attorney must "appear in the circuit court . . . within his judicial circuit, and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party." Fla. Stat. Ann. §27.02.[48] He possesses broad and unreviewable authority to make charging decisions and to initiate and terminate prosecutions.[49] The State Attorney:

---

[48] *Cf.* Fla. R. Crim. Proc. 3.115 (1975): "The state attorney shall provide the personnel or procedure for criminal intake in the judicial system." No further guidelines are established.

[49] The statutes defining the powers of the State Attorney are to be "liberally construed." *Barnes* v. *State,* 58 So.2d 157, 159 (Fla. 1952).

> "[T]he constitution and statutes impose a duty upon the state attorney to prosecute in the circuit court any and all violations of the criminal laws of which that court has jurisdiction either upon his own information or upon indictment by the grand jury. If any indictment has not been found or any information filed for such offense, then all indictable offenses

"[h]as been loosely referred to many times as a 'one-man grand jury'. And he is truly that. He is the investigatory and accusatory arm of our judicial system of government, subject only to the limitations imposed by the Constitution, the common law, and the statutes, for the protection of individual rights and to safeguard against the possible abuses of the far reaching powers so confided."

Imparator v. *Spicola,* 238 So.2d 503, 506 (Fla. App. 1970).

"[W]ithin the limits of the constitution and applicable statutes all steps in the prosecution of persons suspected of crime are under . . . [the state attorney's] supervision and control."

Collier v. *Baker,* 155 Fla. 425, 20 So.2d 652, 653 (1945).[70] Although the Florida legislature could, pursuant to its authority to prescribe the "powers and duties" of the state attorney, *Owens* v. *State,* 61 So.2d 412, 414 (Fla. 1952); *see also Johns* v. *State,* 144 Fla. 256, 197 So. 791 (1940), enact guidelines to specify when a capital indictment should be sought, it has not done so. Consequently, the prosecutor's power to seek or to forego capital indictments remains broadly discretionary:

"[w]here . . . [a state attorney's] duty and authority require the examination of evidence in the determination of law and fact before taking action thereon, his duty and authority is ordinarily not strictly ministerial, but may even be quasi-judicial or discretionary in its character." [71]

triable within the county should be presented to the grand jury by the state attorney."

State v. *Mitchell,* 188 So.2d 684, 687 (Fla. App.), *cert. discharged,* 192 So.2d 281 (Fla. 1966). *See also Smith* v. *State,* 95 So.2d 525, 527 (Fla. 1957). *Cf. Newton* v. *State,* 178 So.2d 341, 344 (Fla. 1965).

[70] All capital prosecutions in Florida must be initiated by indictment. Fla. Const., art. 1, §15, Fla. Stat. Ann. (1970); Fla. R. Crim. Proce. 3.140(a)(1) (1975). Any grand jury, of course, has absolute discretion to indict or not to indict regardless of the evidence presented to it.

Hall v. *State,* 136 Fla. 644, 187 So. 392, 398 (1939).

The state attorney can terminate a criminal action whenever he determines "that the prosecution is not justified." *Barnes* v. *State,* 58 So.2d 157, 159 (Fla. 1951). *See generally Wilson* v. *Renfree,* 91 So.2d 857, 859-860 (Fla. 1956). "[T]he State has a right to take a nolle prosequi at any time prior to the jury being sworn," *State* v. *Sokol,* 208 So.2d 156 (Fla. App. 1968), without consent of the trial court.[72] When a state attorney retracts an indictment or information without the formal entry of a *nolle prosequi,* the charge may be refiled without securing judicial approval.[73] *State* v. *Wells,* 277 So.2d 543, 544 (Fla. App. 1973); *State* v. *Fattorusso,* 228 So.2d 630, 633 (Fla. App. 1969); *Wilk* v. *State,* 217 So.2d 610, 612 (Fla. App. 1969). Under the state attorney's authority to "contract with a criminal for his exemption from prosecution," *Ingram* v. *Prescott,* 111 Fla. 320, 149 So. 369 (1933), he may file capital charges against one co-defendant but not against another equally culpable co-defendant. And the state at-

[71] *Cf. Carlile* v. *State,* 129 Fla. 860, 176 So. 862, 863 (1937): "The state attorney has a very broad discretion in examining witnesses . . . prior to indictment."

[72] If such consent is not obtained and if the *nolle prosequi* is not made part of a formal judgment, the state attorney is not prevented from prosecuting a party in violation of the *nolle prosequi* agreement, however. *Ingram* v. *Prescott,* 111 Fla. 320, 149 So. 369, 370 (1933) (dictum).

[73] Florida Rule of Criminal Procedure 3.191 (1975), setting forth certain provisions to assure criminal defendants a speedy trial, may limit the period in which an action can be refiled by the state attorney.

torney can seek a conviction for any lesser degree of a capital offense, Fla. R. Crim. Proc. 3.140(k)(6) (1975), or for "any lesser offense, which, although not an essential ingredient of the major crime, is spelled out in the accusatory pleading in that it alleges all of the elements of the lesser offense," *State* v. *Anderson,* 270 So.2d 353, 356 (Fla. 1972).

2. Plea Bargaining.

Furthermore, the state attorney's discretion to plea bargain is utterly unfettered by the 1972 capital punishment statute or by any other significant restrictions. Florida Rule of Criminal Procedure 3.170(g) (1975) explicitly authorizes plea bargaining:

> "[t]he defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged in the indictment or information or to any lesser degree of the offense charged."

Rule 3.171(a) (1975) provides that "[t]he Prosecuting Attorney is encouraged to discuss and agree on pleas which may be entered by a defendant." Where plea bargaining precedes the filing of the charging paper, even the discretionary power of the trial court to supervise negotiated dispositions can be avoided. For in Florida, defendants have a legal right to plead guilty to a criminal charge, *Canada* v. *State,* 144 Fla. 633, 198 So. 220, 223 (1940); *Eckles* v. *State,* 132 Fla. 526, 180 So. 764, 766 (1938); and a trial court's power to reject a guilty plea is limited to those cases where the plea is "not 'entirely voluntary by one competent to know the consequence,' or is 'induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance.'" *Reyes* v. *Kelly,* 224 So.2d 303, 305 (Fla. 1969).

> "[A trial court] . . . is not authorize[d] . . . to arbitrarily refuse to accept an unqualified plea of guilty made by a defendant in a non-capital case for any other reason.
>
> "There is no more reason to allow such action by a trial judge than there is to allow a defendant to withdraw such a plea at his pleasure. If a trial judge has the discretion to refuse only for cause permission to withdraw a plea of guilty, he should not be allowed, without cause, to reject such a plea. The right to enter such a guilty plea to a noncapital offense should be no less sacred than the right to enter a plea of not guilty."

224 So.2d at 306. *See* Fla. R. Crim. Proc. 3.160(c) (1975).

Plea bargaining is frequent in capital cases, and the Florida Supreme Court has stated that when a defendant "plead[s] guilty in order to escape the electric chair," he gets "what he bargained for—a life sentence and . . . no right to complain." *Lewis* v. *State,* 93 So.2d 46, 47 (Fla. 1956). Without guidance or restriction—subject only to defendants' willingness to negotiate—a state attorney is free to make the decision whether a capital charge will be pursued or bargained out. No procedures exist to restrain the employment by different state attorneys of differing standards for the acceptance of less-than-capital guilty pleas, or to monitor or correct the inconsistent or capriciously applied policy of an individual state attorney.

3. Jury Discretion.

Although express sentencing discretion is conferred upon the capital trial judge by Fla. Stat. Ann. §921.141 (1975-1976 supp.), *see* pages 21-60 *supra,* the jury also has unfettered power to spare a capital defendant's life by convicting him of a less-than-capital offense. Petitioner's jury, for example, was charged that it might convict him of

first degree murder (R. 473), second degree murder (R. 476), third degree murder (R. 478), or manslaughter (*ibid.*).

Although these respective crimes are defined in terms of elements that are theoretically distinct and mutually exclusive, the imprecision of the definitions allows a jury wide latitude to shape its guilty verdict so as to avoid or permit the imposition of a death penalty at the sentencing stage. (Such action is made more likely when, as here (R. 105-109, 110-114, 175-176), the jurors are informed on *voir dire* that a death penalty may be the result of a verdict of guilty of first degree murder.) For example, a "premeditated design" to take life "is the *ever-present* distinguishing factor," *Anderson* v. *State,* 276 So.2d 17, 18 (Fla. 1973) (emphasis in original), of first degree murder:

> "[a] premeditated design to effect the death of a human being is a fully formulated and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such a purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formulation of the intent."

McCutchen v. *State,* 96 So.2d 152, 153 (Fla. 1957). *See also Purkhiser* v. *State,* 210 So.2d 448, 449 (Fla. 1968); *Mackiewicz* v. *State,* 114 So.2d 684, 691 (Fla. 1959). Although "the term 'premeditated design' is not a term of art," *Polk* v. *State,* 179 So.2d 236, 237 (Fla. App. 1965), and although "'[n]o door should be left open for confusion as to what it means,'" *Anderson* v. *State, supra,* 276 So.2d at 18, the application of the term in any case involves the drawing of exceedingly fine lines which are sufficiently mobile to reflect the jury's consciousness and concern about the possible death-sentencing consequence of drawing the line here or there. For a "premeditated design" is not simply an intent to kill, *Anderson* v. *State, supra,* 276 So.2d at 18; *Cook* v. *State,* 46 Fla. 20, 35 So. 665, 669 (1903), but is rather the formation of an "intent before the act." *Forehand* v. *State,* 126 Fla. 464, 171 So. 241, 242 (1936). The perpetrator must have "'sufficient time . . . fully to frame and to design to kill, and to select the instrument, or to frame the plan to carry this design into execution. . . .'" *Lowe* v. *State,* 90 Fla. 255, 105 So. 829, 831 (1925). There must be time "for some reflection or deliberation upon the matter, for choice to kill or not to kill, resulting in the formation of a deliberate purpose to kill." *Hasty* v. *State,* 120 Fla. 269, 162 So. 910, 912 (1935). But this elaborate reflective process may be performed—if the jury chooses to so find—in the space of an instant, for "[t]he human mind acts with celerity which it is sometimes impossible to measure." *Cook* v. *State, supra,* 35 So. at 672. Accordingly, no particular time is necessarily involved: "[a] moment before the act is sufficient." *O'Bryan* v. *State,* 300 So.2d 323, 325 (Fla. App. 1974); *Hernandez* v. *State,* 273 So.2d 130, 133 (Fla. App. 1973).

> "'It is not essential • • • in order to show prima facie premeditation • • • on the part of a prisoner' that there

should be evidence of 'preconceived purpose to kill, formed at a time anterior to the meeting when it was carried into execution.' It is sufficient if the prisoner deliberately determined to kill before inflicting the mortal wound. If there were such purpose deliberately formed, the interval, if only a moment before its execution, is immaterial."

Lowe v. *State, supra,* 105 So. at 831.

Since "all psychological investigation shows that the process of mental conception lies beyond the scrutiny of exact observation," *ibid.,* premeditated design must frequently be proven by circumstantial evidence.

"Premeditation may be inferred from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted."

Hernandez v. *State,* 273 So.2d 130, 133 (Fla. App. 1973). *See also Larry* v. *State,* 104 So.2d 352, 354 (Fla. 1958); *Rhodes* v. *State,* 104 Fla. 520, 140 So. 309, 310 (1932). It may also be inferred:

"from such circumstances as declarations of intent to kill before or after the crime, previous difficulty between the parties, absence of adequate provocation, remarks and conduct indicating preparation, lying in wait, character of the weapon employed, the nature and number of the blows or wounds inflicted, locality of the wounds, place of the crime, and subsequent acts or statements."

Lowe v. *State, supra,* 105 So. at 832. Or it may not be inferred from these same facts.

For second degree murder (but not for manslaughter)[74] the State must establish that a defendant acted with a "depraved mind regardless of human life":

"[d]epravity of mind is an inherent deficiency of moral sense and rectitude . . . . It is the equivalent of the statutory phrase 'depravity of heart' which has been defined to be the highest grade of malice . . . .

"It is obvious . . . that the phrase 'evincing a depraved mind regardless of human life,' as used in the statute . . . denouncing murder in the second degree, was not used in the legal or technical sense of the word 'malice' in the popular or commonly understood sense of ill will, hatred, spite, and evil intent. It is the malice of the evil motive which the statute makes an ingredient of the crime of murder in the second degree."

Ramsey v. *State,* 114 Fla. 766, 154 So. 855, 856 (1934).[75] *See also Huntly* v. *State,* 66 So.2d 504, 507 (Fla. 1953);

---

[74] The crime of third degree murder in Florida is not, in terms of its elements, an intermediate offense between manslaughter and second degree murder. Third degree murder is instead a felony murder committed "without any design to effect death" in which the predicate felony is not arson, rape, robbery, burglary, kidnapping, aircraft piracy, or "the unlawful throwing, placing, or discharging of a destructive device or bomb." Fla. Stat. Ann. §782.04(3) (1975-1976 supp.). *See Johnson* v. *State,* 91 So.2d 185, 187 (Fla. 1956); *Grimes* v. *State,* 64 So.2d 920, 921 (Fla. 1953); *Tilman* v. *State,* 81 Fla. 558, 88 So. 377, 378 (1921).

[75] So, the *Ramsey* opinion continues, *ibid.*:

"[h]owever severe the criticism may be of the conduct of the accused in killing young Ellis, it cannot be justly said that it proceeded from an evil motive, from ill will, hatred or spite. It may have sprung from a flame of hottest indignation, outraged decency, humiliating insult, produced by a drunken vulgarian's obscene conduct toward the daughter of his host, but emotions of that kind cannot properly be said to be the product of an evil mind, a vicious, corrupt, base, perverse, malicious motive which may be said to characterize a 'depraved mind regardless of human life.'"

Luke v. *State*, 204 So.2d 359, 362 (Fla. App. 1967); *Darty* v. *State*, 161 So.2d 864, 873 (Fla. App. 1964); *Smith* v. *State*, 282 So.2d 179, 189 (Fla. App. 1973); *Bega* v. *State*, 100 So.2d 455, 457 (Fla. App. 1958).

Every defendant charged with first degree murder has a right to have his jury instructed of its power to convict him alternatively of second degree murder, third degree murder or manslaughter:[76]

> "[i]f the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

Fla. R. Crim. Proc. 3.490 (1975).[77] In *Pait* v. *State*, 112 So.2d 380, 386 (Fla. 1959) the Florida Supreme Court declared: "where first degree murder is charged it is required that the trial judge instruct the jury as to all degrees of unlawful homicide."[78] A trial court's refusal to grant a lesser-degree instruction is reversible error.

[76] In Florida, manslaughter is a lesser "degree" of first degree murder. *See Killen* v. *State*, 92 So.2d 825, 826-827 (Fla. 1957), quoted n. 79 *infra*.

[77] This rule became effective on February 1, 1973; its predecessor was the identically worded Fla. Stat. Ann. §919.14 (1969).

[78] The right to lesser-degree instructions may be waived, however. *Clements* v. *State*, 284 So.2d 700 (Fla. 1974) (affirming conviction for first degree murder where the jury had only been instructed on first degree murder; for "trial strategy reasons," 284 So.2d at 701, defense counsel had requested only the first degree murder charge).

Little v. *State*, 206 So.2d 9, 10 (Fla. 1968); *Bailey* v. *State*, 224 So.2d 296, 299 (Fla. 1969).

Instructions on the lesser included offenses may not be refused by the trial court on the ground that there is no evidence to support them; and a conviction for a lesser offense will be affirmed on appeal despite its lack of evidentiary support.

> "This Court is now definitely committed to the rule that wherever evidence is sufficient to sustain a charge of murder in the first degree, whether committed in the perpetration of certain felonies or whether from a specific premeditated design[,] a verdict convicting a defendant of a lesser degree of homicide will not be disturbed even though there is no evidence of the particular degree of the offense for which he might be convicted. We have taken the view that the responsibility of determining the degree of guilt in such cases rests peculiarly within the bosom of the trial jury .... [T]he Court should in all cases instruct the jury on the various degrees of the offense charged in the indictment. When the offense charged is first degree murder, whether grounded on specifically alleged premeditated design, or whether committed in the perpetration of certain felonies . . . the defendant is entitled to have the jury advised on all the degrees of unlawful homicide, including manslaughter. There should be a further instruction that it is in the province of the jury to determine the degree."

Brown v. *State*, 124 So.2d 481, 483 (Fla. 1960).[79] The theory upon which convictions of lesser offenses unsupported by

[79] *See also Killen* v. *State*, 92 So.2d 825, 826-827 (Fla. 1957):

> "[a]ppellant contends that manslaughter is not a lesser degree of homicide included in the charge of murder in the first degree when the murder is committed in the perperation of,

and inconsistent with the evidence are affirmed appears to be that a defendant will not be heard to complain if the jury convicts him of a less severe offense than the crime which is proved. This "jury pardon" is clearly a recognized mechanism for the discretionary dispensation of mercy by the jury:

> "[u]nder our system of jurisprudence, the jury had the right to convict defendant of any lesser degree of the crime charged, and it made no difference whether the elements of this degree of the crime were included in the specific allegations of the indictment or information. Such a verdict convicting a defendant of a lesser degree even in the absence of proof is sometimes

---

> or the attempt to perpetrate, a robbery, and that he should have been found guilty of murder in the first degree or acquitted. We do not consider such to be the law of this State, as this Court consistently has held that where the evidence is sufficient to sustain a charge of murder in the first degree, a verdict convicting a defendant of a lesser degree of unlawful homicide must stand, even though there is no evidence of the particular degree of the offense of which he is convicted. Riner v. State, 128 Fla. 848, 176 So. 38; Ammons v. State, 88 Fla. 444, 102 So. 642; Larmon v. State, 81 Fla. 553, 88 So. 471; Williams v. State, 73 Fla. 1198, 75 So. 785; Johnson v. State, 55 Fla. 41, 46 So. 174; Clemmons v. State, 43 Fla. 200, 30 So. 699; Morrison v. State, 42 Fla. 149, 28 So. 97; Mobley v. State, 41 Fla. 621, 26 So. 732; McCoy v. State, 40 Fla. 494, 24 So. 485; Brown v. State, 31 Fla. 207, 12 So. 640."

Affirming a judgment finding appellant guilty of third degree murder, the Florida Supreme Court rejected appellant's contention that the evidence showed that he was either guilty of first degree murder or not guilty of any crime:

> "the evidence . . . is ample to have sustained a verdict finding the defendant guilty of a higher degree of murder. Therefore, even if in terms it does not make out a case of murder in the third degree, that furnishes no ground for the granting of a new trial."

Johnson v. *State*, 55 Fla. 41, 46 So. 174, 176 (1908).

> referred to as a 'jury pardon' of the highest degree of crime.

Bailey v. *State*, 224 So.2d 296, 297 (Fla. 1968).[80]

4. Executive Clemency.

The Governor, with the "approval of three members of the cabinet" may by executive order commute a death sentence to a sentence of life imprisonment.[81] Although Florida Governors must report their grants of clemency to the legislature,[82] there are no standards whatsoever for the exercise of the commutation power. The reduction of a legally authorized sentence is committed to the unfettered discretion of the executive branch. *Davis* v. *State*, 123 So.2d 703, 711 (Fla. 1960), *LaBarbera* v. *State*, 63 So.2d 654, 655 (Fla. 1953); *Johnson* v. *State*, 61 So.2d 179 (Fla.

---

[80] Other discretionary jury decisions may also spare the life of a capital offender. In a first degree murder case, the jury may be instructed on lesser-included-offenses *in addition to* second degree murder, third degree murder, and manslaughter, depending on the accusatory pleading and the evidence at trial. *See generally*, *Gilford* v. *State*, 313 So.2d 729 (Fla. 1975) ("the *probata* must conform to the *allegata*. The one exception to this is . . . those instances where the offense is divided into *degrees*, without specifying the degrees, and in that instance the trial judge is mandated [by Fla. R. Crim. Proc. 3.490 (1975)] to instruct on such lesser *degrees* of a single offense." 313 So.2d at 732-733 (emphasis in original)). A jury may convict of a non-capital attempt, Fla. R. Crim. Proc. 3.510 (1974-1975 supp.); it may recognize an amorphously defined defense such as insanity, *see, e.g., Davis* v. *State*, 44 Fla. 32, 32 So. 822 (1902); *Perry* v. *State*, 143 So.2d 528 (Fla. App. 1962), or self-defense, *see, e.g., Linsley* v. *State*, 88 Fla. 135, 101 So. 273 (1924), or mitigation such as intoxication, *see, e.g., Gardner* v. *State*, 28 Fla. 113, 9 So. 835 (1891); it may find that a homicide is justifiable, *see* Fla. Stat. Ann. §§776.012, 776.021, 776.031 (1975-1976 supp.); or excusable, *see* Fla. Stat. Ann. §782.03 (1965); or it may simply refuse to convict in spite of the evidence —a recognized phenomenon when the death penalty is involved, *see* Petitioner's *Fowler* Brief, at pp. 90-92, n.133.

[81] Fla. Const., art. 4, §8(a) (1968 rev.).

[82] Fla. Stat. Ann. §940.01(3) (1973).

1952); *Sawyer* v. *State,* 148 Fla. 542, 4 So.2d 713 (1941); *Chavigny* v. *State,* 112 So.2d 910, 915 (Fla. App. 1959).

The power of the Governor to commute a death sentence has been likened to the power of a pre-*Furman* jury to make a recommendation of mercy in any capital case:

> "[t]he matter of reducing the penalty in convictions for murder in the first degree is within the province of the trial jury, in the first instance, and the power of commutation from the extreme penalty to imprisonment for life lies with the authority designated in the Constitution. Article 4 [defining powers of the Governor] . . . ."

Baker v. *State,* 137 Fla. 27, 188 So. 634 (1939). The executive has "broad and wide discretion in . . . commuting punishments," *Ex parte White,* 161 Fla. 85, 178 So. 876, 880 (1938)—so much so that the Florida Supreme Court has declared unconstitutional a statute which required the Governor and his cabinet (who constituted the Board of Pardons under the 1885 Constitution) to afford clemency any time the Court affirmed a death sentence by an equally divided court. *Ibid.*[83]

• • •

All together, Florida law from indictment to electrocution is "honey-combed with discretion"[84] that not merely permits but inevitably entails an arbitrary infliction of the harshest punishment known—or partly known—to man.

---

[83] The only study dealing with the actual exercise of the commutation power in Florida of which we are aware discloses that, between 1960 and 1962, nine death sentences were executed while three were commuted. Note, *Executive Clemency in Capital Cases,* 39 N.Y.U. L. Rev. 136, 191 (1964).

[84] White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment,* 45 Am. J. Orthopsychiatry 581, 587 (1975).

> "[T]he decisions on charging, on acceptance of guilty plea, on determination of the offense for which conviction is warranted, on sentencing, and on executive clemency add up to a process containing too much chance for mistake and too much standardless 'discretion' for it to be decent for us to use it any longer as a means of choosing for death. . . .
>
> "Suppose all the mistake-proneness and standardlessness . . . were concentrated in the decision of one man. We would regard that as so evidently intolerable as to be undiscussable. But it might be better than what we have, for responsibility would at least be fixed. All our system does is to diffuse this same responsibility nearly to the point of its elimination, so that each participant in this long process, though perhaps knowing his own conclusions to be uncertain and inadequately based on lawful standards, can comfort himself with the thought, altogether false and vain, that the lack has been made up, or will be made up, somewhere else."[85]

There is nowhere else. "The law itself must save the parties' rights and not leave them to the discretion of the courts as such." *Louisville & Nashville Ry. Co.* v. *Central Stock Yards Co.,* 212 U.S. 132, 144 (1909). Nor yet to the discretion of prosecutors, jurors, two tiers of judges, and the governor. This, at the very least, *Furman* must hold.

---

[85] Black, *op cit. supra* note 35, at 92-93.

III.

The Excessive Cruelty of Death.

The submissions made in Part III of Petitioner's *Fowler* Brief, at pp. 102-140, and in Part III of the Brief for Petitioner, *Jurek* v. *Texas*, No. 75-5394, are fully applicable to death sentences inflicted under Florida law. *Amicus* respectfully urges their consideration by the Court.

CONCLUSION

The penalty of death imposed upon petitioner Charles William Proffitt is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Florida should therefore be reversed insofar as it affirms his death sentence.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
DAVID E. KENDALL
PEGGY C. DAVIS
10 Columbus Circle, Suite 2030
New York, New York 10019

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for the N.A.A.C.P. Legal Defense and Educational Fund, Inc.

APPENDIX

APPENDIX A

The following persons have been sentenced to death under Florida's 1972 capital punishment legislation; the race of each defendant appears in parenthesis.

1. *Eligaah Ardalle Jacobs* (white), sentenced to death for first degree murder, two counts, February 13, 1976, Pasco County Cir. Ct., No. 74-1408 (jury recommended death).

2. *John A. Kampff* (white), sentenced to death for first degree murder, January 23, 1976, St. Lucie County Cir. Ct., No. 75-338-CF-A (jury recommended death) *appeal pending* [no Fla. Sup. Ct. number assigned yet].

3. *Richard Henry Gibson* (black), sentenced to death for first degree murder, January 6, 1976, Duval County Cir. Ct., No. 75-227-CF-R (jury recommended death) *appeal pending,* Fla. Sup. Ct. No. 48,698.

4. *Jesse Ray Rutledge* (black), sentenced to death for first degree murder, December 31, 1975, Alachua County Cir. Ct., No. 75-457-CF (jury recommended death) *appeal pending,* Fla. Sup. Ct. No. 48,801.

5. *Michael Salvatore* (white), sentenced to death for first degree murder, December 2, 1975, Dade County Cir. Ct., No. 75-2161-B (jury recommended death) *appeal pending* [no Fla. Sup. Ct. No. assigned yet].

6. *Monroe Holmes* (black), sentenced to death for first degree murder, November 7, 1975, Palm Beach

Appendix A

County Cir. Ct., No. 74-1035-CF (waived sentencing jury) *appeal pending,* Fla. Sup. Ct. No. 48,392.

7. *Glen Martin* (black), sentenced to death for first degree murder, October 10, 1975, Volusia County Cir. Ct., No. 75-535 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,464.

8. *Charles K. Foster* (white), sentenced to death for first degree murder, October 4, 1975, Bay County Cir. Ct., No. 75-486 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,380.

9. *Raymond Stone* (white), sentenced to death for first degree murder, October 1, 1975, Union County Cir. Ct., No. 74-71 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,275.

10. *Sampson A. Armstrong* (black), sentenced to death for first degree murder, September 30, 1975, Hardee County Cir. Ct., No. 75-110 (jury recommended death) *appeal pending,* Fla. Sup. Ct. No. 48,516.

11. *Earl Enmond* (black), sentenced to death for first degree murder, September 30, 1975, Hardee County Cir. Ct., Nos. 75-122 and 75-123, (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,525.

12. *Carl Jackson* (black), sentenced to death for first degree murder, September 12, 1975, Bay County Cir. Ct., No. 75-258 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,165.

13. *Danny Gafford* (white), sentenced to death for first degree murder, September 7, 1975, Bay County Cir.

Appendix A

Ct., No. 75-410 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,421.

14. *James David Raulerson* (white), sentenced to death for first degree murder, August 29, 1975, Duval County Cir. Ct., No. 75-1325-CF-P (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,991.

15. *Franz Peter Buckrem* (white), sentenced to death for first degree murder, August 15, 1975, Sarasota County Cir. Ct., No. 75-284-CF-A (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 48,029.

16. *Henry Brown* (black), sentenced to death for first degree murder, August 1, 1975, Dade County Cir. Ct., No. 73-6666-B (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 48,229.

17. *John W. LeDuce* (white), sentenced to death for first degree murder, July 28, 1975, Okaloosa County Cir. Ct., No. 75-53 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,953.

18. *David Livingston Funchess* (black), sentenced to death for first degree murder, July 18, 1975, Duval County Cir. Ct. No. 75-169-CF-R (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,828.

19. *Lenson Hargrave* (white), sentenced to death for first degree murder, July 18, 1975, Dade County Cir. Ct., No. 75-118-A (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,135.

Appendix A

20. *Glen Chambers* (white), sentenced to death for first degree murder, July 11, 1975, Sarasota County Cir., Ct., No. 75-95-CF-A (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 47,888.

21. *Benjamin F. Huckaby* (white), sentenced to death for first degree murder, June 26, 1975, Volusia County Cir. Ct., No. 74-883-B (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,736.

22. *Rudolph Valentine Lee* (black), sentenced to death for first degree murder, June 12, 1975, Duval County Cir. Ct., No. 72-10 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,690.

23. *Leslie R. Jones* (black), sentenced to death for first degree murder, May 15, 1975, Escambia County Cir. Ct., No. 74-1810 (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 47,472.

24. *Thomas Knight* (black), sentenced to death for first degree murder, April 21, 1975, Dade County Cir. Ct., No. 74-5978 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,599.

25. *Edward Clark Barclay* (black), sentenced to death for first degree murder, April 10, 1975, Duval County Cir. Ct., No. 74-4139-CF (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,260.

26. *Jacob John Dougan* (black), sentenced to death for first degree murder, April 10, 1975, Duval County Cir. Ct., No. 74-4139-CF (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,260.

Appendix A

27. *William Duane Elledge* (white), sentenced to death for first degree murder, March 27, 1975, Broward County Cir. Ct., No. 75-0087-CF (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,081.

28. *Delbert Tibbs* (black), sentenced to death for first degree murder, March 24, 1975, Lee County Cir. Ct., No. 74-254-CF (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,258.

29. *Douglas Meeks* (black), sentenced to death for first degree murder, March 12, 1975, Taylor County Cir. Ct., No. 74-2990-CF (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,533; sentenced to death for first degree murder, June 4, 1975, *Taylor* County Cir. Ct., No. 74-300-CF (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,533.

30. *William L. Harvard* (white), sentenced to death for first degree murder, March 6, 1975, Brevard County Cir. Ct., No. 74-713-CF-A (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,052.

31. *Clarence R. Purdy* (white), sentenced to death for rape, February 12, 1975, Lake County Cir. Ct., No. 74-561 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,074.

32. *Levis Leon Aldrich* (white), sentenced to death for first degree murder, January 8, 1975, St. Lucie County Cir. Ct., No. 74-335-CF-A (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 46,958.

Appendix A

33. *Alvin Bernard Ford* (black), sentenced to death for first degree murder, January 6, 1975, Broward County Cir. Ct., No. 74-2159-CF-A (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 47,059.

34. *Charles Messer* (white), sentenced to death for first degree murder, January 3, 1975, Santa Rosa County Cir. Ct., No. 74-I-21 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 46,849.

35. *Ronald Jackson* (black), sentenced to death for first degree murder, December 23, 1974, Dade County Cir. Ct., No. 74-6666-B (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 48,229.

36. *Clyde Foster* (black), sentenced to death for first degree murder, December 14, 1974, Columbia County Cir. Ct., No. 74-248-CF (jury recommended death).

37. *George Thomas Vasil* (white), sentenced to death for first degree murder, December 12, 1974, St. Lucie County Cir. Ct., No. 74-336-CF-A (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 46,654.

38. *Walter Albert Carnes* (black), sentenced to death for first degree murder, November 19, 1974, Escambia County Cir. Ct., No. 74-2131-CF (jury recommended mercy) *conviction aff'd., death sentence vacated,* Fla. Sup. Ct., No. 46,673.

39. *Michael Edward Provence* (white), sentenced to death for first degree murder, October 31, 1974, Manatee County Cir. Ct., No. 73-4195 (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 46,671.

Appendix A

40. *James Calvin Agan* (white), sentenced to death for first degree murder, September 27, 1974, Hillsborough County Cir. Ct., No. 74-1687, Div. A. (waived sentencing jury) *appeal pending,* Fla. Sup. Ct., No. 48,052.

41. *Mac Reed Tedder II* (black), sentenced to death for first degree murder, July 26, 1974, Hernando County Cir. Ct., No. 74-26 (jury recommended mercy) *aff'd,* 322 So.2d 908 (Fla. 1975).

42. *Joseph G. Brown* (black), sentenced to death for first degree murder, July 3, 1974, Hillsborough County Cir. Ct., No. 73-2180-C (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 46,925.

43. *Vernon R. Cooper* (white), sentenced to death for first degree murder, July 1, 1974, Escambia County Cir. Ct., No. 74-185 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 45,966.

44. *James Dupree Henry* (black), sentenced to death for first degree murder, June 26, 1974, Orange County Cir. Ct., No. 74-953 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 46,105.

45. *James Curtis McCrae* (black), sentenced to death for first degree murder, May 21, 1974, Lee County Cir. Ct., No. 73-636-CF (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 45,894.

46. *Thomas A. Halliwell* (white), sentenced to death for first degree murder, May 10, 1974, Hillsborough County Cir. Ct., No. 74-286 (jury recommended

death) *aff'd.*, Fla. Sup. Ct., No. 45,885 (December 3, 1975).

47. *Ernest John Dobbert* (white), sentenced to death for first degree murder, April 12, 1974, Duval County Cir. Ct., No. 73-5068-5 (jury recommended mercy) *aff'd.*, Fla. Sup. Ct., No. 45,558 January 14, 1976.

48. *Gary Eldon Alvord* (white), sentenced to death for first degree murder, April 9, 1974, Hillsborough County Cir. Ct., No. 73-13986 (jury recommended death) *aff'd.*, 322 So. 2d 533 (Fla. 1975).

49. *Darius Slater* (black), sentenced to death for first degree murder, April 4, 1974, Orange County Cir. Ct., No. 73-2065 (jury recommended mercy) *conviction aff'd., death sentence vacated,* 316 So.2d 539 (Fla. 1975).

50. *Jon Steven Miller* (white), sentenced to death for first degree murder, April 1, 1974, Lee County Cir. Ct., No. 72-251-F (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 45,689.

51. *Jackson B. Burch* (black), sentenced to death for first degree murder, March 29, 1974, Palm Beach County Cir. Ct., No. 73-885 (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 45,359.

52. *Charles William Proffitt* (white), sentenced to death for first degree murder, March 24, 1974, Hillsborough County Cir. Ct., No. 73-1397 (jury recommended death) *aff'd.*, 315 So.2d 461 (Fla. 1975) *cert. granted,* 44 U.S.L.W. 3439, January 22, 1976.

53. *James Adams* (black), sentenced to death for first degree murder, March 15, 1974, St. Lucie County Cir. Ct., No. 73-284-CF-A (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 45,450.

54. *Lloyd Swan* (black), sentenced to death for first degree murder, March 1, 1974, Dade County Cir. Ct., No. 73-5039 (jury recommended mercy), *conviction aff'd., death sentence vacated,* 322 So.2d 485 (Fla. 1975).

55. *Carl Ray Songer* (white), sentenced to death for first degree murder, February 28, 1974, Osceloa County Cir. Ct., No. 74-27 (jury recommended death) *aff'd.*, 322 So.2d 481 (Fla. 1975), *pending on petition for certiorari,* No. 75-5800.

56. *Johnny Paul Witt* (white), sentenced to death for first degree murder, February 21, 1974, Volusia County Cir. Ct., No. 74-181 (jury recommended death) *appeal pending,* Fla. Sup. Ct., No. 45,796.

57. *Willie Jasper Darden* (black), sentenced to death for first degree murder, January 23, 1974, Citrus County Cir. Ct., No. 73-2027-C (jury recommended death) *aff'd.*, Fla. Sup. Ct., Nos. 45,108 and 45,056 (February 18, 1976).

58. *Larry Thompson* (black), sentenced to death for first degree murder, January 11, 1974, Orange County Cir. Ct., No. 73-2386 (jury recommended mercy), *conviction aff'd., death sentence vacated,* Fla. Sup. Ct., No. 45,107 (January 21, 1976).

Appendix A

59. *Daniel Wilber Gardner* (white), sentenced to death for first degree murder, January 30, 1974, Citrus County Cir. Ct., No. 73-132 (jury recommended mercy) *aff'd.* 313 So.2d 675 (Fla. 1975), *pending on petition for certiorari,* No. 74-6593.

60. *John A. Spinkellink* (white), sentenced to death for first degree murder, December 20, 1973, Leon County Cir. Ct., No. 73-138 (jury recommended death) *aff'd.,* 313 So.2d 666 (Fla. 1975), *pending on petition for certiorari,* No. 75-5209.

61. *Otis Terry Williams* (black), sentenced to death for first degree murder, December 6, 1973, Orange County Cir. Ct., No. CR 73-2039 (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 45,010.

62. *James R. McCaskill* (black), sentenced to death for first degree murder, December 6, 1973, Orange County Cir. Ct., No. CR 73-1979 (jury recommended mercy) *appeal pending,* Fla. Sup. Ct., No. 45,009.

63. *Howard Virgil Douglas* (white), sentenced to death for first degree murder, December 4, 1973, Polk County Cir. Ct., No. 73-1632-CF-C (jury recommended mercy), *aff'd.,* Fla. Sup. Ct., No. 44,864, February 18, 1976.

64. *Robert Sullivan* (white), sentenced to death for first degree murder, November 12, 1973, Dade County Cir. Ct., No. 73-3236 (jury recommended death) *aff'd.,* 303 So.2d 632 (Fla. 1974), *pending on petition for certiorari,* No. 74-6377.

Appendix A

65. *Clifford Hallman* (white), sentenced to death for first degree murder, November 11, 1973, Hillsborough County Cir. Ct., No. 73-1685 (jury recommended death) *aff'd.,* 305 So.2d 180 (Fla. 1974) *pending on petition for certiorari,* No. 74-6168.

66. *Leo Learie Alford* (black), sentenced to death for first degree murder, October 16, 1973, Palm Beach County Cir. Ct., No. 73-159-CF (jury recommended death), *aff'd.,* 307 So.2d 433 (Fla. 1975), *pending on petition for certiorari,* No. 74-671.

67. *Anthony Lee Sawyer* (black), sentenced to death for first degree murder, October 15, 1973, Dade County Cir. Ct., No. 73-1001 (jury recommended mercy), *aff'd.,* 313 So.2d 680 (Fla. 1975), *pending on petition for certiorari,* No. 74-6563.

68. *Jimmie Lee Jones* (black), sentenced to death for first degree murder, September 28, 1973, Pasco County Cir. Ct., No. 73-326 (jury recommended mercy), *appeal pending.* Fla. Sup. Ct., No. 44,669.

69. *Joseph Taylor* (black), sentenced to death for first degree murder, July 27, 1973, Broward County Cir. Ct. No. 73-261-CF (jury recommended mercy) *conviction aff'd., death sentence vacated,* 294 So.2d 698 (Fla. 1974).

70. *Michael LaMadline* (white), sentenced to death for first degree murder, July 24, 1973, Okaloosa County Cir. Ct., No. 73-60 (no sentencing jury), *conviction aff'd., death sentence vacated* 303 So.2d 17 (Fla. 1974).